Supreme Court, U.S.
FILED

No. 07- 07-233 AUG 17 2007

In The OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

DANIEL CRAWFORD,

Petitioner,

v.

CITY OF FAIRBURN, GEORGIA

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ERIC SCHNAPPER*
University of Washington School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

CHRISTOPHER G. MOORMAN
Law Offices of Christopher G. Moorman
945 East Paces Ferry Road, Suite 2610
Atlanta, GA 30326
(404) 760-2730

ROBERT N. KATZ
Katz, Stepp & Miller, LLC
945 East Paces Ferry Road, Suite 2610
Atlanta, GA 30326
(404) 240-0400

Attorneys for Petitioner *Counsel of Record

PARTIES

The parties to this action are set forth in the caption.

TABLE OF CONTENTS

Page

Question Presented i

Parties ii

Table of Contents iii

Table of Authorities v

Table of Appendices ix

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provision Involved 1

Statement of the Case 2

Reasons for Granting the Writ 6

I. There Is A Well Established Conflict Among the Court of Appeals And A State Supreme Court Regarding The Standard for Evaluating Discrimination Cases In Which An Employer Gives Multiple Explanations for the Disputed Action 6

A. The Eleventh and Fifth Circuit Separate Rebuttal Requirement 8

B. The Third Circuit Impaired Credibility and "Fair Number" Standards 12

C. The Sixth and Seventh Circuit "Intertwined" and "Suspicious" Standards 14

D. The Tenth Circuit Seven-Part Standard 15

E. The Mississippi Supreme Court Standard 17

F. The First Circuit Standard 18

II. The Conflict Is Well Recognized 20

Conclusion 21

TABLE OF AUTHORITIES

Page

CASES

Abramson v. William Patterson College of New Jersey,
260 F. 3d 265 (3d Cir. 2001) 8, 13

Adreani v. First Colonial Bankshares Corp.,
154 F. 3d 389 (7th Cir. 1998) 7, 14, 20

Arnold v. Tuskegee University, 212 Fed. Appx. 803,
810 (11th Cir. 2006) 10

Bodenheimer v. PPG Indus., 5 F. 3d 955, 958
(5th Cir. 1993) 19

Bojd v. Golder Associates, Inc., 212 Fed. Appx. 860,
862 (11th Cir. 2006) 10

Bryant v. Farmers Insurance Exchange,
432 F. 3d 1114, 1126 (10th Cir. 2005) 7, 8, 16, 17

Cash Distributing Co. v. Neely, 947 So. 2d 286,
296-98 (Miss. 2007) 7, 17

Champ v. Calhoun County Emergency Mgmt. Agency,
2007 WL 879846 at *7 (March 26, 2007) 8, 10

Chapman v. AI Transport, 229 F. 3d 1012
(11th Cir. 2000) 4, 5, 6, 7, 8, 10, 16, 19, 20

Combs v. Plantation Patterns, 106 F. 3d 1519, 1539
(11th Cir. 1997) 9

Cooper v. Southern Co., 390 F. 3d 695 (11th Cir. 2004) 9

Crim v. Board of Ed. of Cairo School Dist. No. 1,
147 F. 3d 535, 542 (7th Cir. 1998) 14

EEOC v. Texas Instruments Inc., 100 F. 3d 1173
(5th Cir. 1996) 7, 10

Fuentes v. Perskie, 32 F. 3d 759 (3d Cir. 1994) 8, 12, 13, 16, 19

Jaramillo v. Colorado Judicial Dept.,
427 F. 3d 1303, 1311 (10th Cir. 2005) 8, 16, 17, 20

Johnson v. City of Fort Wayne, Indiana,
91 F. 3d 922, 937 n. 22 (7th Cir. 1996) 8, 14, 15

Kautz v. Met-Pro Corp., 412 F. 3d 463 (3d Cir. 2005) 7, 13

Martinez v. United States Department of Energy,
170 Fed. Appx. 517, 521 n. 7 (10th Cir. 2006) 7, 8, 15, 16, 17

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 6, 7, 15, 18, 20

McKinney v. R & L Foods, LLC, Civil Action
No.06-AR-0696-S, (N.D.Ala.), p. 29
(Opinion dated May 31, 2007) 21

Minshall v. McGraw Hill Broadcasting Co.,
323 F. 3d 1273, 1280 (10th Cir. 2003) 7, 16, 17

Narin v. Lower Merion School District,
206 F. 3d 323 (3d Cir. 2000) 7, 13

Preston v. Texas Dept. of Family and Protective
Services, 222 Fed. Appx. 353 (5th Cir. 2007) 8, 11

Rhodes v. Guiberson Oil Tools, 75 F. 3d 989
(5th Cir. 1996)(en banc) 7, 10

Rhodes v. Professional Transportation, Inc.,
3 Fed. Appx. 515, 520 (7th Cir. 2001) 14

Roebuck v. Drexel University, 852 F. 2d 715 (3d Cir. 1988) 8, 13

Russell v. Acme-Evans Co., 51 F. 3d 64, 70
(7th Cir. 1995) 8, 14, 15, 20

Sher v. U.S. Department of Veterans Affairs,
488 F. 3d 489, 2007 WL 1532655
(1st Cir. 2007) 8, 18, 19, 20

Smith v. Chrysler Corp., 155 F. 3d 799 (6th Cir. 1998) ... 8, 15, 20, 21

Staten v. New Palace Casino, LLC, 187 Fed. Appx. 350
(5th Cir. 2006) 8, 11

Texas Dept. of Community Affairs v. Burdine,
450 U.S. 248, 256 (1981) 7

Tomasso v. The Boeing Co., 445 F. 3d 702 (3d Cir. 2006) 7, 12

Tyler v. RE/MAX Mountain States, Inc.,
232 F. 3d 808, 814 (10th Cir. 2000) 6, 8, 15, 16, 17, 20

Vigil v. City of Albuquerque, 210 Fed. Appx. 758,
764 n. 4 (10th Cir. 2006) 8, 15, 16

Wallace v. Methodist Hospital System,
271 F. 3d 212 (5th Cir. 2001) 8, 11, 18, 20

Wilson v. AM General Corp., 167 F. 3d 1114
(7th Cir. 1999) 7, 14, 15

Wolf v. Buss (America) Inc., 77 F. 3d 914 (7th Cir. 1996) ... 7, 14, 15

Zaccagnini v. Chas. Levy Circulating Co., 338 F. 3d 672,
679-80 (7th Cir. 2003) 14

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 7

42 U.S.C. §2000e-3 1

42 U.S.C. §3601 6

TABLE OF APPENDICES

Page

Appendix A —United States Court of Appeals For The Eleventh Circuit Denial of Rehearing En Banc Filed May 23, 2007 ..... 1a

Appendix B —Opinion of the United States Court of Appeals For The Eleventh Circuit Dated and Decided on March 29, 2007 ..... 3a

Appendix C —Order Of The United States District Court Adopting The Magistrate Judge's Report And Recommendation Entered May 18, 2006 ..... 10a

Appendix D —United States Magistrate Judge's Final Report and Recommendation Entered February 1, 2006 ..... 22a

PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Crawford respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on March 29, 2007.

OPINIONS BELOW

The March 29, 2007, opinion of the court of appeals, which is reported at 482 F. 3d 1305 (11th Cir. 2007), is set out at pp. 3a-9a of the Appendix.[1] The May 23, 2007, order of the court of appeals denying rehearing en banc, which is not officially reported, is set out at pp. 1a-2a of the Appendix. The May 18, 2006, opinion of the district court, which is not officially reported, is set out at pp. 10a-21a of the Appendix. The February 1, 2006, Report and Recommendation of the Magistrate Judge, which is not officially reported, is set out at pp. 22a-81a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on March 29, 2007. A timely petition for rehearing en banc was denied on May 23, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 704(a) of Title VII, 42 U.S.C. §2000e-3, provides in pertinent part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees... because he has

[1] An earlier opinion was issued on February 21, 2007. Following a timely petition for rehearing and suggestion for rehearing en banc, that opinion was vacated. (App. 4a).

opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."

STATEMENT OF THE CASE

In 2003 petitioner Daniel Crawford, then a Major in the Fairburn Police Department, was assigned to investigate a sexual harassment complaint that had been filed in that year by Officer Louise Tallman. Tallman alleged that she had been sexually harassed by a Sergeant in the Department.

Crawford conducted an exhaustive investigation of Tallman's allegations, interviewing approximately 25 witnesses and reviewing a substantial number of documents. (App.26a). During the course of this investigation Crawford also looked into a sexual harassment complaint that Tallman had filed with the Fairburn Police in 2002. Tallman had also filed a Title VII charge with EEOC about the incidents in 2002, and that Title VII charge was still pending at the EEOC when Crawford conducted his 2003 investigation. On December 11, 2003, the EEOC made a finding that there was probable cause to believe that Tallman had been sexually harassed in 2002. The City asked the EEOC to defer further action on the Title VII charge until Crawford had completed his investigation. (App.26a).

City officials, however, were very displeased by the nature of Crawford's investigation of the sexual harassment allegation. In December, 2003, the City Administrator in a meeting with the Police Chief objected to Crawford's investigation on several grounds.

> "[The City Administrator] stated that: (1) it was Plaintiff's fault that the EEOC investigation was occurring; (2) Plaintiff "opened a can of worms"; and (3) Plaintiff's investigation was going to get Fairburn sued." (App.26a)

On January 22, 2004, Crawford submitted his report on the Tallman allegations. Crawford concluded that the Sergeant had been guilty of verbal harassment and disrespectful conduct toward Tallman, but that the harassment had not created a hostile work environment. (App.28a).

The finding of disrespectful conduct was based on verbal comments that the Sergeant had made to Tallman, which Crawford concluded were "based on gender." (App.32a).

Within a month of his report Crawford was dismissed. The City Administrator recommended that the City Council dismiss Crawford by abolishing his job, and the Council agreed. The City Administrator directed the Police Chief to dismiss Crawford, and advised the Chief that one reason for the dismissal was that the sexual harassment investigation that Crawford had conducted was "inaccurate." (App.38a). The Police Chief in turn fired Crawford, explaining to him that the sexual harassment investigation was among the reasons for the dismissal. (App.39a).[2]

Crawford brought suit against the city under Title VII, alleging that he had been dismissed in retaliation for his role in the sexual harassment investigation. After a period of discovery, the city moved for summary judgment. In support its summary judgment motion, Fairburn asserted that it had dismissed Crawford for several different reasons.[3]

The Magistrate Judge who first considered the summary judgment motion concluded that one of the reasons for Crawford's

---

[2]The Police Chief permitted Crawford to resign. (App.38a-39a). Respondent and the courts below properly treated this forced resignation as a dismissal. (App.41a).

[3]At the time of Crawford's dismissal, the City Administrator advised the Police Chief that there were three reasons for the dismissal, and the Chief mentioned only those reasons when he fired Crawford. (App.41a).

dismissal was his conduct of the sexual harassment investigation. City officials insisted they objected only to an assertedly "inaccurate" aspect of the investigation. But the Magistrate Judge held that trier of fact could find that the city's actual objection was to the vigor with which Crawford had pursued the sexual harassment allegations.

> "[A]t least one motive for firing Plaintiff was his inaccurate investigation [of Tallman's complaints.]... Although it is not clear what [the City Administrator] meant by an "inaccurate" investigation, the Court can reasonably infer, in the absence of any evidence regarding the meaning of this statement, that this was a result of the fact that Plaintiff investigated events surrounding the 2002 EEOC complaint. [The City Administrator] even stated that one of his concerns with Plaintiff's investigation was Plaintiff's decision to delve into events of 2002... Further, [the City Administrator] indicated that Plaintiff's investigation would open a can of worms and subject the city to a lawsuit... As a result, Defendant's arguments that the inaccuracies must have dealt with some non-protected aspect of the investigation is not persuasive." (App.60a).

The Magistrate Judge concluded that a second reason proffered for dismissing Crawford might also have been a pretext. (App.67a and App.69a).

The Magistrate Judge nevertheless held that summary judgment should be granted on Crawford's retaliation claim. Although Crawford had discredited two of the City's reasons, Crawford had failed to offer separate evidence directly addressing three other reasons that had been offered by the City. Citing the controlling Eleventh Circuit decision in *Chapman v. AI Transport*, 229 F. 3d 1012 (11th Cir. 2000)(en banc), the Magistrate Judge reasoned that the plaintiff's evidence was insufficient because "he failed to rebut all legitimate reasons provided by Defendant. *See Chapman*, 229 F. 3d at 1037." (App.74a). The District Judge agreed that summary judgment was required. (App.20a-21a).

The Eleventh Circuit affirmed, concluding that the decision in *Chapman* was controlling. The court of appeals noted that Fairburn had offered several reasons to justify its decision to fire Crawford.

> "The City introduced evidence that Crawford was terminated for five nondiscriminatory reasons: the inaccuracy of the Tallman investigation, patrols and traffic stops on Interstate 85, complaints relating to officer pay, problems with the dispatchers, and complaints of low morale and favoritism." (App.7a).

The Eleventh Circuit, like the Magistrate Judge, concluded that Crawford had proffered sufficient evidence to support a finding that the first of these reasons was pretextual. "Viewed in the light most favorable to Crawford, [the remarks of the City Administrator] suggest a retaliatory animus" behind the city's objection to the Tallman investigation. (App.8a). But that evidence, the court held, was inadequate to prove unlawful retaliation.

The en banc decision in *Chapman*, the panel noted, required a plaintiff to offer evidence separately rebutting each of an employer's proffered reasons.

> "If the employer proffers more than one legitimate, nondiscriminatory reason, the plaintiff must rebut each of the reasons to survive a motion for summary judgment. *Chapman v. AI Transp.*, 229 F. 3d 1012, 1037 (11th Cir 2000)(en banc).... Crawford erroneously argues that evidence of a discriminatory animus allows a plaintiff to establish pretext without rebutting each of the proffered reasons of the employer." (App.7a-8a).

Although the City Administrator's remarks about the sexual harassment investigation

> "suggest a retaliatory animus, they do not respond to

> the explanation of the City that Crawford's performance was unsatisfactory in four *other* areas of his responsibility." (App.8a)(emphasis added).

Thus, under *Chapman*, Crawford's evidence was insufficient because it did not "directly rebut[]" some of the City's proffered reasons. (App.8a).

Crawford petitioned for rehearing en banc, urging the Eleventh Circuit to overturn the requirement in *Chapman* that a discrimination plaintiff "directly rebut[]" each and every reason proffered by a defendant. Subsequent to the decision in *Chapman*, the petition noted, the Mississippi Supreme Court had rejected that precedent in deciding federal employment discrimination claims.[4] The Eleventh Circuit denied the petition for rehearing en banc. (App.1a-2a).

REASONS FOR GRANTING THE WRIT

I. THERE IS A WELL ESTABLISHED CONFLICT AMONG THE COURTS OF APPEALS AND A STATE SUPREME COURT REGARDING THE STANDARD FOR EVALUATING DISCRIMINATION CASES IN WHICH AN EMPLOYER GIVES MULTIPLE EXPLANATIONS FOR THE DISPUTED ACTION

This case presents a well established and complex inter-circuit conflict regarding the standard for proving intentional discrimination in employment.[5] Most federal employment cases are resolved under

---

[4]Petition for Rehearing En Banc, *Crawford v. City of Fairburn, Georgia*, No. 06-13073-F (11th Cir.), pp. 3-13.

[5]The same question has also arisen under the Federal Housing Act, 42 U.S.C. §3601. *Tyler v. RE/MAX Mountain States, Inc.*, 232 F. 3d 808, 814 (10th Cir. 2000).

this Court's decisions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. Once a plaintiff has made out a prima facie case, *McDonnell Douglas* requires the defendant to articulate a non-discriminatory reason for the disputed employment action. The burden then returns to the plaintiff to rebut the proffered reason by demonstrating that it is "unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). The *McDonnell Douglas* line of decisions in this Court set out a framework for evaluating a discrimination case in which the employer offers a single explanation for the disputed action.

As this case illustrates, however, employers often give *multiple* reasons for the dismissal, promotion denial, or other action complained of. The lower courts are sharply divided regarding what evidence a plaintiff is required to offer in such a case. Some circuits, like the Eleventh Circuit in this case, require that the plaintiff separately rebut each and every reason given by the employer; the fact that one or more proffered reasons has been shown to be untruthful is accorded no significance in evaluating the truthfulness of the employer's remaining reasons. Most circuits hold, to the contrary, that the pretextuality of one reason may or does constitute evidence that the remaining reasons are also pretextual; the circuits adhering to that view, however, have themselves articulated widely divergent standards.

The instant case involves a claim of unlawful retaliation violating Title VII of the 1964 Civil Rights Act. The same issue has arisen regarding alleged violations of the Age Discrimination in Employment Act[6], the Americans With Disabilities Act[7], 42 U.S.C. §

---

[6]*Tomasso v. The Boeing Co.*, 445 F. 3d 702 (3d Cir. 2006); *Martinez v. United States Department of Energy*, 170 Fed. Appx. 517, 521 n. 7 (10th Cir. 2006) *Bryant v. Farmers Insurance Exchange*, 432 F. 3d 1114, 1126 (10th Cir. 2005); *Kautz v. Met-Pro Corp.*, 412 F. 3d 463 (3d Cir. 2005); *Minshall v. McGraw Hill Broadcasting Co.*, 323 F. 3d 1273, 1280 (10th Cir. 2003); *Chapman v. Al Transport*, 229 F. 3d 1012, 1037 (11th Cir. 2000)(en banc); *Narin v. Lower Merion School District*, 206 F. 3d 323 (3d Cir. 2000); *Wilson v. AM General Corp.*, 167 F. 3d 1114 (7th Cir. 1999); *Adreani v. First Colonial Bankshares Corp.*, 154 F. 3d 389 (7th Cir. 1998); *EEOC v. Texas Instruments Inc.*, 100 F. 3d 1173 (5th Cir. 1996); *Wolf v. Buss (America) Inc.*, 77 F. 3d 914 (7th Cir. 1996); *Rhodes v. Guiberson Oil Tools*, 75 F.

1981[8], and the Title VII prohibitions against discrimination on the basis of race[9], gender[10], national origin[11] and religion[12] discrimination. The courts of appeals are in agreement that the same standard--whatever it may be--applies to all these federal statutes.

A. The Eleventh and Fifth Circuit Separate Rebuttal Requirement

The decision in this case applies the longstanding Eleventh Circuit rule that a plaintiff must adduce evidence separately and

---

3d 989 (5th Cir. 1996)(en banc); *Cash Distributing Co. v. Neely*, 947 So. 2d 286, 296-98 (Miss. 2007).

[7]*Chapman v. AI Transport*, 229 F. 3d 1012, 1037 (11th Cir. 2000)(en banc); *Smith v. Chrysler Corp.*, 155 F. 3d 799 (6th Cir. 1998).

[8]*Tyler v. RE/MAX Mountain States, Inc.*, 232 F. 3d 808, 814 (10th Cir. 2000); *Roebuck v. Drexel University*, 852 F. 2d 715 (3d Cir. 1988).

[9]*Preston v. Texas Dept. of Family and Protective Services*, 222 Fed. Appx. 353 (5th Cir. 2007); *Staten v. New Palace Casino, LLC*, 187 Fed. Appx. 350 (5th Cir. 2006); *Johnson v. City of Fort Wayne, Indiana*, 91 F. 3d 922, 937 n. 22 (7th Cir. 1996); *Russell v. Acme-Evans Co.*, 51 F. 3d 64, 70 (7th Cir. 1995); *Fuentes v. Perskie*, 32 F. 3d 759 (3d Cir. 1994); *Roebuck v. Drexel University*, 852 F. 2d 715 (3d Cir. 1988).

[10]*Champ v. Calhoun County Emergency Mgmt. Agency*, 2007 WL 879846 at *7 (March 26, 2007); *Bryant v. Farmers Insurance Exchange*, 432 F. 3d 1114, 1126 (10th Cir. 2005); *Jaramillo v. Colorado Judicial Dept.*, 427 F. 3d 1303, 1311 (10th Cir. 2005); *Wallace v. Methodist Hospital System*, 271 F. 3d 212 (5th Cir. 2001).

[11]*Sher v. U.S. Department of Veterans Affairs*, 488 F. 3d 489, 2007 WL 1532655 (1st Cir. 2007); *Martinez v. United States Department of Energy*, 170 Fed. Appx. 517, 521 n. 7 (10th Cir. 2006); *Vigil v. City of Albuquerque*, 210 Fed. Appx. 758, 764 n. 4 (10th Cir. 2006); *Abramson v. William Patterson College of New Jersey*, 260 F. 3d 265 (3d Cir. 2001).

[12]*Sher v. U.S. Department of Veterans Affairs*, 488 F. 3d 489, 2007 WL 1532655 (1st Cir. 2007).

"directly" rebutting each reason proffered by a defendant employer, regardless of whether the plaintiff has already proved that one or more of the employer's asserted reasons was pretextual. That rule dates from the 1997 decision in *Combs v. Plantation Patterns*, 106 F. 3d 1519, 1539 (11th Cir. 1997).

The panel relied specifically on the divided en banc decision in *Chapman v. AI Transport*, 229 F. 3d 1012 (11th Cir. 2000), which endorsed that circuit's "well-established rule that a plaintiff must show pretext as to each proffered reason." 229 F. 3d at 1037 n. 30. "In order to avoid summary judgment, a plaintiff must produce sufficient evidence for a reasonable factfinder to conclude that each of the employer's proffered reasons is pretextual." 229 F. 3d at 1037. In a case (like *Combs*) in which an employer adduced three reasons, a defendant would be entitled to judgment as a matter of law (or summary judgement) if the plaintiff offered evidence rebutting only two of the three reasons. There must be distinct evidence "related to *each* of the three proffered nondiscriminatory reasons." 229 F. 3d at 1037 n. 30 (*quoting Combs*)(emphasis in *Chapman*). The majority in *Chapman* emphatically rejected the argument of several dissenters that the pretextuality of one proffered reason could itself be evidence that the other reasons were also pretextual. 229 F. 3d at 1037 n. 30.

Since *Chapman* the Eleventh Circuit has repeatedly applied the rule that a plaintiff must offer separate evidence directly rebutting each reason proffered by an employer. In *Cooper v. Southern Co.*, 390 F. 3d 695 (11th Cir. 2004), the court of appeals emphasized that a plaintiff must present "sufficient evidence to demonstrate the existence of a genuine issue of fact as to the *truth* of each of the employer's proffered reasons for its challenged action." 390 F. 3d at 735-36 (*quoting Combs*, 106 F. 3d at 1529)(emphasis added).

> "[E]ven if Cooper could discredit one of the reasons . . . offered for not hiring him, it would still not establish pretext, because to do so, Cooper would have to establish that *each* of [the employer's proffered] reasons was pretextual. *See Chapman....*"

390 F. 3d at 730 (emphasis in original). The Eleventh Circuit reiterated this requirement in *Champ v. Calhoun County Emergency Management Agency*, 2007 WL 879846 at *7 (11th Cir. 2007), *Arnold v. Tuskegee University*, 212 Fed. Appx. 803, 810 (11th Cir. 2006), and *Bojd v. Golder Associates, Inc.*, 212 Fed. Appx. 860, 862 (11th Cir. 2006).

The instant case is a routine application of this Eleventh Circuit rule. The court of appeals acknowledged that Crawford had adduced sufficient evidence to establish that the defendant's reliance on purported defects in the sexual harassment investigation was a pretext for discrimination. Under *Chapman*, however, that was insufficient as a matter of law. The evidence related to that investigation

> "suggest[s] a retaliatory motive, but... do[es] not respond to the explanation of the City that Crawford's performance was unsatisfactory in four other areas of his responsibility." (App.8a).

Evidence that city officials may have lied in explaining their objection to the sexual harassment investigation "is not evidence that the City's other proffered reasons were false." (App.7a). *Chapman* requires a plaintiff to separately and "directly rebut[]" each of the employer's multiple reasons. (App.8a).

The Fifth Circuit, like the Eleventh Circuit, requires a discrimination plaintiff to offer separate evidence rebutting each and every reason advanced by an employer.

> "[T]he plaintiff in [a]... disparate treatment case must offer evidence to rebut each of the employer's articulated legitimate, nondiscriminatory reasons... '[A] plaintiff can avoid summary judgment and judgment as a matter of law if the evidence . . . creates a fact issue as to whether *each of the employer's stated reasons* was what actually motivated the employer.' "

EEOC v. Texas Instrument Inc., 100 F. 3d 1173, 1180 (11th Cir. 1996)(*quoting Rhodes v. Guiberson Oil Tools*, 75 F. 3d 989, 994 (5th Cir. 1996)(en banc))(emphasis added in *Texas Instrument*). Applying that rule, the Fifth Circuit overturned a jury finding of discrimination in *Wallace v. Methodist Hospital System*, 271 F. 3d 212 (11th Cir. 2001). "The plaintiff must put forward evidence rebutting each of the nondiscriminatory reasons the employer articulates." 271 F. 3d at 220. The evidence in *Wallace* was held insufficient because it only demonstrated the falsity of one of the two reasons given by the employer.[13] In *Staten v. New Palace Casino, LLC*, 187 Fed. Appx. 350 (11th Cir. 2006), the Eleventh Circuit held that summary judgment was required because the plaintiff's evidence directly rebutted only one of the employer's two reasons.[14] In *Preston v. Texas Dept. of Family and Protective Services*, 222 Fed. Appx. 353 (11th Cir. 2007), the plaintiff offered evidence demonstrating that two reasons given by her employer were pretextual. The court of appeals held that summary judgment for the employer was required, because the employer had offered a total of six reasons, and four remained unrebutted. 222 Fed.

---

[13] 271 F. 3d at 221-22:

"We agree with Wallace that this [proof] constitutes evidence of disparate treatment with respect to the first reason Methodist articulated. Methodist offered two *independent* reasons for terminating Wallace, each of which alone could have served as a basis for terminating her.... Wallace falls short of her burden of presenting evidence rebutting *each* of the legitimate nondiscriminatory reasons produced by Methodist." (Emphasis in original).

[14] 187 Fed. Appx. at 360-61:

"Our review of the record supports Staten's claim of pretext regarding New Palace's [first] explanation... Considering all the facts and drawing all inferences in favor of Staten, a factfinder could "reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves* [*v. Sanderson Plumbing Products, Inc.*], 530 U.S. [133,] 147 [(2000)].... Although Staten has successfully rebutted New Palace's [first] explanation.... she must rebut *each* nonretaliatory reason articulated by New Palace.... Staten has produced no evidence to contradict New Palace's [second] asserted explanation." (Emphasis in original).

Appx. at 359-60. "Preston must rebut *each* legitimate reason articulated by [the defendant." *Id.* (emphasis in original).

B. The Third Circuit Impaired Credibility and "Fair Number" Standards

The Third Circuit holds that a plaintiff is not required to directly rebut each and every explanation proffered by an employer.

> "We do not hold that, to avoid summary judgment, the plaintiff must cast doubt on each proffered reason in a vacuum. If the defendant proffers a bagful of legitimate reasons, and the plaintiff manages to cast substantial doubt on *a fair number* of them, the plaintiff may not need to discredit the remainder. That is because the factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining the remaining rationales in particular is available."

Fuentes v. Perskie, 32 F. 3d 759, 764 n. 7 (3d Cir. 1994) (Emphasis added).

The Third Circuit has repeatedly reaffirmed its view that evidence rebutting "a fair number" of the employer's proffered reasons could be sufficient to impair the employer's credibility and thus undermine the remaining reasons.

> "As we stated in *Fuentes*, the employee need not always offer evidence sufficient to discredit all of the rationales advanced by the employer... In *Fuentes* we explained that the rejection of some explanations may so undermine the employer's credibility as to enable a rational factfinder to disbelieve the remaining rationales, even where the employee fails to produce evidence particular to those rationales."

Tomasso v. The Boeing Co., 445 F. 3d 702, 707 (3d Cir. 2006). In *Tomasso* evidence rebutting two of the employer's seven proffered reasons was sufficient under *Fuentes* to fatally undermine the remaining five. 445 F. 3d at 709-10. The *Fuentes* standard was reiterated in *Narin v. Lower Merion School District*, 206 F. 3d 323, 332 (3d Cir. 2000)(*Fuentes* was "careful to note" that rejection of some reasons could undermine the rest); *Abramson v. William Patterson College of New Jersey*, 260 F. 3d 265, 283 (3d Cir. 2001)("importantly" *Fuentes* made clear that a plaintiff need not invariably offer evidence separately rebutting each proffered reason.)

Although rebuttal of a "fair number" of employer reasons may be sufficient under *Fuentes*, that is not the only circumstance in which a plaintiff's rebuttal evidence can call into question the credibility of non-rebutted reasons. In *Roebuck v. Drexel University*, 852 F. 2d 715 (3d Cir. 1988), evidence rebutting a single reason was held sufficient to impair the credibility of the key employer official regarding another proffered explanation. In that case a University department head testified that Roebuck had been denied tenure for two reasons, inadequate service and insufficient scholarship. If the jury concluded that the first reason was pretextual, the Third Circuit held, it could infer that the second reason was as well.

> "[G]iven [the department head's] willingness to apply a more rigorous standard to Roebuck's service activities than that called for in college guidelines (or, alternatively, given a jury finding that [this] asserted explanation was merely pretextual), a jury reasonably could conclude that [the department head] likewise was willing to treat Roebuck's scholarship more harshly than it otherwise would deserve. Put differently, once a jury has concluded that [the department head] would have rated Roebuck's service "outstanding" but for his race, common sense allows the jury to conclude that [the department head] was similarly willing to allow race to determine his rating of Roebuck's other qualifications."

852 F. 2d at 734 (3d Cir. 1988). In *Kautz v. Met-Pro Corp.*, 412 F. 3d 463, 476 (3d Cir. 2005), the Third Circuit applied the *Fuentes* impaired credibility standard to a case involving only two proffered reasons.

C. The Sixth and Seventh Circuit "Intertwined" And "Suspicious" Standards

The Seventh Circuit has also rejected the Eleventh (and Fifth) Circuit rule that each employer reason must always be separately rebutted. In *Russell v. Acme-Evans Co.*, 51 F. 3d 64 (7th Cir. 1995), the Seventh Circuit held that there were two types of situations in which evidence rebutting only one (or some) of an employer's proffered reasons could be sufficient to support a finding of discrimination:

> "cases in which the multiple grounds offered by the defendant for the adverse action of which the plaintiff complains are... intertwined, or the pretextual character of one of them is... fishy and suspicious..."

51 F. 3d at 70.

The Seventh Circuit has reiterated that standard in six subsequent decisions. *Zaccagnini v. Chas. Levy Circulating Co.*, 338 F. 3d 672, 679-80 (7th Cir. 2003); *Rhodes v. Professional Transportation, Inc.*, 3 Fed. Appx. 515, 520 (7th Cir. 2001); *Wilson v. AM General Corp.*, 167 F. 3d 1114, 1120 (7th Cir. 1999); *Crim v. Board of Ed. of Cairo School Dist. No. 1*, 147 F. 3d 535, 542 (7th Cir. 1998); *Adreani v. First Colonial Bankshares Corp.*, 154 F. 3d 389, 399 (7th Cir. 1998)[15]; *Johnson v. City of Fort Wayne, Indiana*, 91 F.

---

[15]"[W]e have indicated that [a requirement that the plaintiff contest all an employer's reasons] ought not be followed when the grounds that are offered are so intertwined or the pretextual ground for one of them so strong that a reasonable jury, hearing all the proffered grounds, could find for the plaintiff on the discrimination issue."

3d 922, 937 n. 23 (7th Cir. 1996); *Wolf v. Buss (America) Inc.*, 77 F. 3d 914, 920 (7th Cir. 1996).

In *Zaccagnini* the Seventh Circuit relied on this rule to overturn an award of summary judgment.

> "We believe this case is one 'in which the multiple grounds offered by the defendant for the adverse action... are so intertwined or the pretextual character of one of them so fishy and suspicious, that the plaintiff [can] withstand summary judgment.' *Russell*...."

338 F. 3d at 679. In *Wilson* the court of appeals applied the "intertwined" or "suspicious" standard to uphold a jury verdict in favor of the plaintiff. 167 F. 3d at 1120-21. In *Johnson* the Seventh Circuit set aside an award of summary judgment in favor of the employer and remanded the case for additional development of the record regarding whether the proffered reasons were intertwined. 91 F. 3d at 937 n. 23.

The Sixth Circuit in *Smith v. Chrysler Corp.*, 155 F. 3d 799, (6th Cir. 1998), adopted the Seventh Circuit's "intertwined" or "suspicious" standard. 155 F. 3d at 809. *Smith* quoted the rule in *Russell*, and warned that under that standard "an employer's strategy of simply tossing out a number of reasons to support its employment action in the hope that one of them will 'stick' could easily backfire." 155 F. 3d at 809.

D. The Tenth Circuit Seven Part-Standard

The Tenth Circuit has identified seven different circumstances in which evidence rebutting only some, or even one, of an employer's multiple reasons can be sufficient to undermine all the other proffered reasons.

(1) "[T]he multiple ground offered by the defendant... are so intertwined... that the plaintiff may prevail." *Tyler v. RE/MAX Mountain States*, 232 F. 3d 808, 814 (10th Cir. 2000). For this rule *Tyler* cited two Seventh Circuit cases, *Wilson* and *Russell*. This basis for holding that a plaintiff can prevail despite rebutting fewer than all of an employer's proffered reasons was reiterated in *Vigil v. City of Albuquerque*, 210 Fed. Appx. 758, 764 n. 4 (10th Cir. 2006), *Martinez v. United States Dept. of Energy*, 170 Fed. Appx. 517, 521 n. 9 (10th Cir. 2006), and *Jaramillo v. Colorado Judicial Dept.*, 427 F. 3d 1303, 1311 (10th Cir. 2005).

(2) "[T]he pretextual character of one explanation is 'so fishy and suspicious,'... that a jury could 'find that the employer (or its decisionmaker) lacks all credibility.'" *Jaramillo*, 427 F. 3d at 1311 (*quoting* the dissenting opinion of Judge Birch in *Chapman*, 229 F. 3d at 1050). This basis for holding that a plaintiff can prevail despite rebutting fewer than all of an employer's proffered reasons was reiterated in *Vigil*, 210 Fed. Appx. at 764 n. 4, *Martinez*, 170 Fed. Appx. at 521 n. 9, and *Tyler*, 232 F. 3d at 814.

(3) "'[W]hen the plaintiff casts substantial doubt on many of the employer's multiple reasons, the jury could reasonably find the employer lacks credibility. Under those circumstances, the jury need not believe the employer's remaining reasons.'... *[a]ccord Fuentes v. Perskie*, 32 F. 3d 759, 764 n. 7 (3d Cir. 1994)." *Bryant v. Farmers Insurance Exchange*, 432 F. 3d 1114, 1126 (10th Cir. 2005)(*quoting Tyler*). This basis for holding that a plaintiff can prevail despite rebutting fewer than all of an employer's proffered reasons was reiterated in *Vigil*, 210 Fed. Appx. at 764 n. 4, *Martinez*, 170 Fed. Appx. at 521 n. 9, *Jaramillo*, 427 F. 3d at 1311, *Plotke v. White*, 405 F. 3d 1092, 1103 (10th Cir. 2005), and *Minshall v. McGraw Hill Broadcasting Co., Inc.*, 323 F. 3d 1273, 1280 (10th Cir. 2003).

(4) "[I]f a person is shown to be a liar in an outrageous manner..., the inference that the person is non-credible, and should not be believed as to other issues, is a reasonable one." *Tyler*, 232 F. 3d at

814 (*quoting* the dissenting opinion of Judge Birch in *Chapman*, 229 F. 3d at 1050).

(5) "[T]he employer has changed its explanation under circumstances that suggest dishonest or bad faith." *Jaramillo*, 427 F. 3d at 1311. This basis for holding that a plaintiff can prevail despite rebutting fewer than all of an employer's proffered reasons was reiterated in *Martinez*, 170 Fed. Appx. at 521 n. 9.

(6) "[T]he plaintiff discredits each of the employer's objective explanations, leaving only subjective reasons to justify its decision." *Jaramillo*, 427 F. 3d at 1311. This basis for holding that a plaintiff can prevail despite rebutting fewer than all an employer's proffered reasons was reiterated in *Martinez*, 170 Fed. Appx. at 521 n. 9.

(7) "Where... one of the stated reasons... predominates over the others, demonstrating that reason to be pretextual is enough to avoid summary judgment." *Bryant*, 432 F. 3d at 1127.[16]

Relying on one or more of these seven rules, the Tenth Circuit reversed awards of summary judgment in *Bryant* and *Plotke*, and upheld jury verdicts for the plaintiffs in *Minshall* and *Tyler*.

E. The Mississippi Supreme Court Standard

In *Cash Distributing Co., Inc. v. Neely*, 947 So. 2d 286 (Miss. 2007), the Mississippi Supreme Court expressly rejected the rule in the Fifth and Eleventh Circuits that a plaintiff in a federal employment discrimination case must separately rebut every explanation given by the employer. The plaintiff in *Cash Distributing* had brought suit in

---

[16]"It is not simply a question of how many of the defendant's reasons a plaintiff has refuted, but rather a question of whether casting doubt on a particular justification necessarily calls into doubt the other justifications."

state court under the ADEA, and the Mississippi Supreme Court acknowledged that the standard of proof was governed by federal law.[17] The plaintiff had rebutted only one of the reasons that Cash Distributing gave for having fired him.

The company argued that the plaintiff had to "rebut every nondiscriminatory reason offered for his termination... to offer proof that each of the events Cash claims led to his dismissal did not actually happen." 947 So. 2d at 296. The company specifically urged the Mississippi Supreme Court to adopt the Fifth Circuit rule in *Wallace*, and a minority of the Mississippi Supreme Court agreed with *Wallace*. 947 So. 2d at 307 (dissenting opinion). But the majority "decline[d] to follow the Fifth Circuit's view that an ADEA plaintiff must specifically rebut each and every nondiscriminatory reason offered by the employer [for] its adverse employment action." 947 So. 2d at 296. "We do not read *McDonnell Douglas* and *Burdine* to require a Title VII (or ADEA) plaintiff to rebut with specific evidence each and every nondiscriminatory reason offered by an employer for the determination." 947 So. 2d at 293-94.

The plaintiff in *Cash Distributing* had rebutted one proffered reason for his termination by showing that younger workers guilty of the same asserted misconduct had not been dismissed. 947 So. 2d at 307 (dissenting opinion). That evidence was sufficient, the majority reasoned, to permit the jury to infer that the other asserted misconduct--even if it had indeed occurred--also would not have led to the dismissal of younger workers, and thus was not the actual reason for his termination.

F. The First Circuit Standard

The recent First Circuit decision in *Sher v. U.S. Department of Veterans Affairs*, 488 F. 3d 489 (1st Cir. 2007), reflects the confused state of the law in the lower courts.

---

[17] 947 So. 2d at 292 ("When a plaintiff brings an ADEA claim in our state courts, we are bound to apply the law as interpreted by the United States Supreme Court.")

The discussion in *Sher* begins with an ambiguous statement that

> "when an employer offers multiple legitimate, nondiscriminatory reasons for an adverse employment action, a plaintiff *generally* must offer evidence to counter each reason."

488 F. 3d at 507 (emphasis added). That indicates that there would be some cases in which separate rebuttal evidence is not required.

Sher then cites three cases which it describes as "consistent with" this rule. The First Circuit quotes the Seventh Circuit decision in *Wolf*, setting forth that circuit's "intertwined" and "fishy" standards. 488 F. 3d at 508. *Sher* also quotes a passage from the Third Circuit decision in *Fuentes*, but not the critical footnote 7 in *Fuentes*, which established that circuit's "fair number" standard. 488 F. 3d at 507-08. Finally, the First Circuit cites, but does not quote, a Fifth Circuit decision[18] that contains neither that circuit's standard, nor indeed any rule at all, regarding cases in which an employer proffers several reasons. 488 F. 3d at 508

Sher then simply concludes, without further comment, "Thus, Sher must provide evidence that *both* [reasons proffered by the employer] were pretext for discrimination." 488 F. 3d at 508. (emphasis in original). The First Circuit opinion offers no explanation whatever as to why the "general[]" rule, as opposed to the quoted exception in *Wolf* (or perhaps the somewhat different exceptions in *Fuentes*) applied in that particular case. It is apparent that in the First Circuit, unlike the Fifth and Eleventh Circuits, a plaintiff need not always have evidence separately rebutting each reason proffered by an employer, but when and why a plaintiff is permitted to do less is entirely unclear.

---

[18] *Bodenheimer v. PPG Indus.*, 5 F. 3d 955, 958 (5th Cir. 1993).

II. THE CONFLICT IS WELL RECOGNIZED

The inter-circuit conflict on this issue is well recognized. In the Eleventh Circuit en banc decision in *Chapman*, for example, three members of the court of appeals rejected the majority's absolute requirement that each reason be separately rebutted. The dissenters argued that the Eleventh Circuit should instead "adopt the Third, Sixth, Seventh and D.C. Circuits' exceptions to the general rule of requiring a plaintiff to rebut each proffered reason." 229 F. 3d at 1051. The dissenters expressly endorsed the Third Circuit decision in *Fuentes*, the Seventh Circuit decisions in *Russell*, *Wolf*, and *Adreani*, and the Sixth Circuit decision in *Smith*. 229 F. 3d at 1049. The *Chapman* majority emphatically rejected the broader Third, Sixth, Seventh and D.C. Circuit standard proposed by the dissent.[19]

In *Cash Distributing* the Mississippi Supreme Court noted that there was among the lower courts "an inconsistent understanding and application of the concept of rebutting the employer's nondiscriminatory explanation for terminating the aggrieved employee." 947 So. 2d at 293. The Mississippi Supreme Court correctly characterized the Fifth Circuit rule as the "minority position." 947 So. 2d at 294. The court acknowledged that its own holding was "a rejection of the test set forth by the Fifth circuit in *Wallace*," which it noted was the same as the Eleventh Circuit standard in *Chapman*. 947 So. 2d at 294 n. 9. The Mississippi court insisted that the Fifth (and Eleventh) standard were based on "confusion" and a "misreading of the Supreme Court's holdings in *McDonnell Douglas* and *Burdine*." 947 So. 2d at 294. "[W]e are unable to find any statutory support for the [Fifth Circuit rule], nor do we find it espoused or approved by any decision of the United States Supreme Court." *Id.*

In the Tenth Circuit, the decision in *Tyler*, 232 F. 3d at 814,

---

[19] 229 F. 3d at 1037 n. 30:

"The dissenting opinion would carve out a number of exceptions to the well-established rule that a plaintiff must show pretext as to each proffered reason... [W]e reject that exception."

endorsed and quoted excerpts from the dissenting opinion in *Chapman* articulating the "outrageous lie" and "casting doubt on many reasons" standard. The Tenth Circuit decision in *Jaramillo*, 427 F. 3d at 1311, quoted and endorsed the "fishy and suspicious" standard in the *Chapman* dissent.

One commentator correctly concluded, after an exhaustive analysis of the lower court decisions on this issue, that "different circuits have different approaches to the multiple justification situation." L. Rosenthal, *Motions for Summary Judgment When Employers Offer Multiple Justifications for Adverse Employment Actions: Why The Exceptions Should Swallow The Rule*, 2002 Utah L. Rev. 335, 371.

These conflicting standards give rise to inconsistent litigation incentives. As the Sixth Circuit noted in *Smith*, in that and several other circuits "an employer's strategy of simply tossing out a number of reasons to support its employment action in the hope that one of them will 'stick' could easily backfire." 155 F. 3d at 809. On the other hand, as a District Judge in the Eleventh Circuit recently noted, the Eleventh Circuit decision in the instant case "invites employers to articulate multitudinous facially legitimate reasons for their adverse employment decisions, each and all of which must be proven pretextual by evidence beyond that in the prima facie case."[20]

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

---

[20]Memorandum Opinion, *McKinney v. R & L Foods, LLC*, Civil Action No. 06-AR-0696-S, (N.D.Ala.), p. 29 (Opinion dated May 31, 2007).

Respectfully submitted,

ERIC SCHNAPPER*
University of Washington School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

CHRISTOPHER G. MOORMAN
Law Offices of Christopher G. Moorman
945 East Paces Ferry Road, Suite 2610
Atlanta, GA 30326
(404) 760-2730

ROBERT N. KATZ
Katz, Stepp & Miller, LLC
945 East Paces Ferry Road, Suite 2610
Atlanta, GA 30326
(404) 240-0400

Attorneys for Petitioner *Counsel of Record

APPENDIX

Appendix A —United States Court of Appeals For The Eleventh Circuit Denial for Rehearing En Banc File May 23, 2007

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-13073-FF

DANIEL CRAWFORD,

Plaintiff-Appellant,

Versus

CITY OF FAIRBURN, GEORGIA

Defendant-Appellee.

On appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: BIRCH and PRYOR, Circuit Judges, and NANGLE, * District Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

[PUBLISH]

Appendix B —Opinion of the United States Court of Appeals For The Eleventh Circuit Dated and Decided on March 29, 2007

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-13073

D. C. Docket No. 04-02590-CV-CAM-1

DANIEL CRAWFORD,

Plaintiff-Appellant,

versus

CITY OF FAIRBURN, GEORGIA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(March 29, 2007)

Before BIRCH and PRYOR, Circuit Judges, and NANGLE,* District Judge.

PRYOR, Circuit Judge:

Our previous opinion in this case issued on February 21, 2007. Upon sua sponte reconsideration of this appeal, we vacate our previous opinion and substitute the following opinion in its place.

Daniel Crawford appeals the summary judgment in favor of his employer, the City of Fairburn, and against his complaint of retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Because Crawford has failed to establish that the legitimate, nondiscriminatory reasons the City offered for Crawford's termination were a pretext for discrimination, we affirm the summary judgment against Crawford's complaint.

I. BACKGROUND

We describe the facts based on a review of the evidence in the light most favorable to Crawford. In September 2002, Officer Louise Tallman of the Fairburn Police Department filed an internal complaint of sexual harassment against Sergeant James Smith. In December 2002, Tallman filed an EEOC charge against the City that alleged age and sex discrimination based on Smith's alleged harassment.

In March 2003, the City hired Crawford to serve in its Police Department as a Major in the administration of Chief of Police Frederick Brown. Both men were hired to address pervasive problems of management and morale. Crawford oversaw the operations of the Department, including personnel matters and internal affairs investigations.

In November 2003, Tallman filed another internal complaint against Smith. Tallman alleged a second incident of sexual

harassment that she believed occurred in response to her still-unresolved 2002 complaint. Crawford began investigating the complaint, and he added to his investigation allegations of insubordination, failure to support the Department, and engaging in gossip and rumors.

On December 11, 2003, the EEOC determined that it was more likely than not that Tallman experienced sexual harassment with respect to the charge she filed in 2002. Later in December 2003, Crawford met with Chief Brown, the City Administrator, and City attorneys to discuss his investigation of Tallman's complaints. In another meeting later that month, the City Administrator told Crawford that it was Crawford's fault that the EEOC was investigating the City, Crawford had "open[ed] up a can of worms," and Crawford's investigation was going to get the City sued.

On January 22, 2004, Crawford submitted the report of his investigation to Chief Brown. The one-page report stated findings of internal violations by Smith such as insubordination, failure to support the Department, and gossip; a finding of no violation with respect to the complaint of a hostile work environment; a finding of no violation with respect to Tallman's 2002 complaint of verbal harassment; and a finding that the 2003 incident, although intimidating, was not sexual harassment. The City Administrator and City Clerk read the report and concluded that the investigation had found no evidence of unlawful discrimination or harassment. The City Attorney then informed the EEOC that the investigation was complete and there had been no findings of Title VII violations against Tallman.

By February 2004, the City had become dissatisfied with Crawford's performance. Crawford had created a new traffic enforcement unit within the Department, and its occasional patrolling of Interstate 85 proved unpopular with the City Administrator. Crawford was also involved with the termination, reinstatement, and resignation of a disgruntled police dispatcher in December 2003. The

Mayor and City Council took interest in the alleged problems with scheduling, understaffing, and morale in the dispatch department. The City Administrator then raised several of his concerns about the Police Department, including staff discontent, unfair scheduling practices, poor management, and poor communication with the City—but not including the sexual harassment allegations—and recommended that Crawford be terminated, and the Council agreed. The Administrator explained to Chief Brown that Crawford would be terminated because of the problems involving the patrolling of Interstate 85, the dispatchers, and Crawford's investigation of Tallman's complaints. Brown allowed Crawford to resign on February 27, 2004.

After his resignation, Crawford filed an EEOC charge, and the EEOC issued a notice of right to sue. Crawford sued the City and complained that the City had retaliated against him for conducting the Tallman investigation. The City moved for summary judgment. The district court concluded that Crawford had engaged in protected activity but failed to establish that the legitimate, nondiscriminatory reasons for Crawford's termination proffered by the City were pretextual. The district court granted summary judgment for the City.

II. STANDARD OF REVIEW

We review a grant of summary judgment de novo and view the evidence in the light most favorable to the nonmoving party. Brooks v. County Comm'n, 446 F.3d 1160, 1161-62 (11th Cir. 2006). Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

III. DISCUSSION

Crawford relies on circumstantial evidence to support his complaint of retaliation, and we will assume, without deciding, that

Crawford established a prima facie case of retaliation. If a Title VII plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 1824-25 (1973). If the employer articulates a legitimate, nondiscriminatory reason for its actions, "the presumption of discrimination is rebutted, and the burden of production shifts to the plaintiff to offer evidence that the alleged reason of the employer is a pretext for illegal discrimination." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1087 (11th Cir. 2004); see also Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 255-56, 101 S. Ct. 1089, 1094-95 (1981). The plaintiff must meet the reason proffered head on and rebut it. Wilson, 376 F.3d at 1088. If the employer proffers more than one legitimate, nondiscriminatory reason, the plaintiff must rebut each of the reasons to survive a motion for summary judgment. Chapman v. AT Transp., 229 F.3d 1012, 1037 (11th Cir. 2000) (en banc).

The City produced evidence that Crawford was terminated for five nondiscriminatory reasons: the inaccuracy of the Tallman investigation, patrols and traffic stops on Interstate 85, complaints relating to officer pay, problems with the dispatchers, and complaints of low morale and favoritism. On appeal, Crawford does not attempt to rebut any of these reasons. Instead, he has presented evidence that the City Administrator stated in December 2003 that Crawford's investigation of Officer Tallman's complaints had opened up a "can of worms" and was going to get the City sued. Crawford also points to the Administrator's February 2004 statement to Chief Brown that the inaccuracy of the investigation was one of the reasons Crawford was terminated.

We need not address whether the belief of the City that Crawford's investigation was inaccurate was a legitimate, nondiscriminatory reason or evidence of illegal discrimination. What it is not is evidence that the City's other proffered reasons were false. Likewise, the December 2003 statements of the administrator

do not raise questions about the truthfulness of any of the proffered reasons. Viewed in the light most favorable to Crawford, they suggest a retaliatory animus, but they do not respond to the explanation of the City that Crawford's performance was unsatisfactory in four other areas of his responsibilities.

Crawford erroneously argues that evidence of a discriminatory animus allows a plaintiff to establish pretext without rebutting each of the proffered reasons of the employer. The cases he cites for this proposition are inapposite, because in each case the plaintiff presented evidence that directly rebutted the proffered reasons of the employer. See Wilson, 376 F.3d at 1090-91 (evidence that decisionmaker believed that plaintiff was more qualified than promoted employee); Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1363-66 (11th Cir. 1999) (evidence that plaintiff did not perform poorly and that the decisionmaker had engaged in the same rule violation for which plaintiff was terminated); Ross v. Rhodes Furniture, Inc., 146 F.3d 1286, 1291 (11th Cir. 1998) (evidence that supervisor had engaged in activity for which plaintiff was terminated). By failing to rebut each of the legitimate, nondiscriminatory reasons of the City, Crawford has failed to raise a genuine issue of material fact about whether those reasons were pretext for discrimination.

Crawford has also failed to raise a genuine issue of material fact under a "mixed motive" analysis. See generally Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45, 109 S. Ct. 1775, 1787-88 (1989) (plurality opinion). The City met its burden of establishing that Crawford would have been terminated even if his investigation was not a factor when it presented evidence of the other nondiscriminatory reasons for his termination. See Pulliam v. Tallapoosa County Jail, 185 F.3d 1182, 1186 (11th Cir. 1999). The burden then shifted back to Crawford to present evidence that his termination was motivated by an improper consideration. Because Crawford has failed to establish that the explanation of the City was pretextual, he has also failed to establish that the City was motivated

by the consideration of an impermissible factor. See Id. at 1186 n.6.

IV. CONCLUSION

The summary judgment for the City is

AFFIRMED.

Appendix C —Order Of The United States District Court Adopting The Magistrate Judge's Report And Recommendation Entered May 18, 2006

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DANIEL CRAWFORD, :

Plaintiff, :

v. : 1:04-CV-2590-CAM

CITY OF FAIRBURN, :

Defendant. :

ORDER

Magistrate Judge Alan J. Baverman's Report and Recommendation of February 1, 2006 [#71], plaintiff's objections filed on March 3, 2006 [#77], defendant's objections filed on March 3, 2006 [#78], defendant's response to plaintiff's objections filed on March 31, 2006 [#84], plaintiff's response to defendant's objections filed on March 31, 2006 [#83], and defendant's reply to plaintiff's objections filed on April 17, 2006 [#85], having been read and considered; the court hereby ADOPTS said Report and Recommendation, as modified by this order, GRANTING defendant's motion for summary judgment for the reasons set forth therein as well as the reasons set forth below.

This is an action for alleged retaliatory discharge under Title VII of the Civil Rights Act of 1964 and the First Amendment. Plaintiff alleges that his investigation and report into a subordinate employee's internal complaint of sexual harassment constitute

BEST AVAILABLE COPY

protected conduct under the "Opposition" and "Participation" Clauses of Title VII as well as protected speech under the First Amendment. (Complaint, ¶¶ 24, 30, 33—36). The Magistrate Judge issued a Report and Recommendation recommending that defendant's motion for summary judgment be granted in its entirety and that the complaint be dismissed. Although the Magistrate Judge found that plaintiff's involvement in Officer Tallman's workplace grievances against Sgt. Smith constituted a protected activity and that record evidence is sufficient to establish causation between plaintiff's protected activity under the participation clause and his subsequent termination, the Magistrate Judge recommended summary judgment on the grounds that there are no questions of fact as to whether defendant's articulated reasons were pretextual.

Both parties have filed objections to the Report and Recommendation. Because the Report and Recommendation recommends that defendant's motion for summary judgment be granted in its entirety, defendant's objections are directed only to alternative grounds for summary judgment. As defendant points out, its objections were submitted to preserve its right to present these alternative grounds as additional bases for this court's adoption of the Magistrate Judge's recommendation of summary judgment. Because this court finds that the Magistrate Judge's recommendations, in most parts, are properly supported by relevant law and facts, the court need not address the majority of the alternative grounds set forth by defendant.

In objecting to the Report and Recommendation, plaintiff does not challenge the recommendations of summary judgment on his claims under either the Opposition Clause of Title VII or the First Amendment. He thus does not oppose the entry of summary judgment on those claims. Plaintiff's objections solely focus on the Magistrate Judge's recommendation that summary judgment be granted to defendant on his Title II/Participation Clause claim. Plaintiff contends, among other things, that the Magistrate Judge failed to consider evidence that helped plaintiff make a prima facie

case at the pretext stage and failed to consider evidence that clearly demonstrates pretext.

Plaintiff argued that defendant's four legitimate, nondiscriminatory reasons for terminating plaintiff - - Fairburn Police Department ("FPD") officers patrolled and made traffic stops on I-85, FPD officers complained about not being properly compensated, dispatcher problems, and complaints of low morale or favoritism with the FPD — - were pretexts for discrimination. The Magistrate Judge concluded that plaintiff failed to proffer sufficient evidence to show pretext.

In his objections, plaintiff contends that the statements made by the City Administrator (that plaintiff was terminated because of the "inaccuracy" of his investigation, a protected activity, and that plaintiff was "opening a can of worms" that would get the City sued) constitute evidence of retaliatory motive and are sufficient to create a jury issue with regard to pretext. "Whether comments standing alone show pretext depends on whether the substance, the context, and timing could permit a finding that the comments are causally related to the adverse employment action at issue." Ashe V. Argnov Homes, Inc., 354 F.Supp.2d 1251, 1262 (N.D.Ala. 2004). The court finds that the City Administrator's comments, in the context of the circumstance of this case, would not be sufficient to allow a reasonable factfinder to discredit all other lawfully stated reasons for the firing.

With respect to the "opening a can of worms" comment, it was uttered by the City Administrator after he was made aware of plaintiff's intention to expand his investigation of Tallman's 2003 internal complaint by inquiring into Tallman's 2002 EEOC charge.[1]

---

[1] As defendant points out, had plaintiff's investigation been limited to Tallman's 2003 internal complaint of sexual harassment, plaintiff's investigation would not constitute a protected activity under Title VII'S Participation Clause. See Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1352—53 (11th Cir. 1999); EEOC v. Total System Services, Inc., 221 F. 3d 1171, 1174 (11th Cir. 2000) (holding that

It is undisputed, however, that the City Administrator made no effort whatsoever to restrict the scope of plaintiff's investigation or to influence its outcome. To the contrary, plaintiff admits that the City Administrator cooperated with his expansion of the investigation; by providing information and documentation relating to Tallman's 2002 EEOC charge in response to plaintiff's subsequent inquiry. (Williams Dep., Exhibit 2, pp. 230-35; Plaintiff Dep., pp. 206—08, 223—26, Exhibit 1 at Tab B).

In addition, the City Administrator formed the impression, several weeks after plaintiff's investigation, that that investigation had yielded no evidence supporting Officer Tallman's complaints of sexual harassment against Sgt. Smith (both the 2002 EEOC charge and the 2003 internal complaint). Any supposed concern on the part of the City Administrator that plaintiff's efforts would "open a can of worms" and "get the City sued" was alleviated at that point. See Addison v Gwinnett County, 917 F.Supp. 802, 812 (N.D.Ga. 1995), aff'd, 78 F.3d 600 (11th Cir. 1996) (holding that "lack of motive for retaliation may properly be considered as a factor in determining whether the plaintiff has met [his] burden of proof.").

With respect to the City Administrator' s reference to the "accuracy of the internal affairs investigation" in discussing the termination decision with Chief Brown,[2] it is undisputed that

---

"Congress [did not] intend to protect absolutely every sexual harassment complaint made to an employer . . . as a protected activity under the participation clause."). For conduct to be protected under the Participation Clause of Title VII, a plaintiff must show that he participated in an EEOC-related proceeding or activity that occurs in conjunction with the filing of a formal charge with the EEOC. Total System Services, Inc., 221 F. 3d at 1174.

[2] Clearly, Chief Brown's testimony is not "direct testimony" of plaintiff's having been fired because of his investigation into the Tallman complaints. Chief Brown's testimony as a whole makes clear that he lacked direct knowledge of the Mayor and Council's decision making process. Moreover, Chief Brown testified that he believed that the City Administrator, the Mayor, and the City Council were genuinely upset with plaintiff because of their perception that he was responsible for problems relating to morale, favoritism and activity on Interstate 85. Chief

plaintiff's internal investigation and report were not considered or otherwise discussed at the February 27, 2004 City Council meeting at which the decision was made to terminate plaintiff. (Faulkner Dep., pp. 8, 23, 92). The record in this case demonstrates that plaintiff's purported protected activity - his internal investigation and report - was not a factor in the decision to terminate his employment.

Even assuming that the issue of "accuracy" of plaintiff's internal investigation report was a factor in the decision to terminate his employment, it does not indicate that the City Administrator harbored any retaliatory animus against plaintiff for participating in an EEOC proceeding.[3] The uncontroverted record reflects a consensus of understanding among the Mayor, the City Council, the City Administrator, and the City Clerk that plaintiff's investigation and report found no evidence of sexual harassment or discrimination - a finding favorable to the City. As such, the reasonable inference to be drawn is that any concern relating to the "accuracy" of plaintiff's internal investigation or report referred to matters unrelated to Officer Tallman's internal complaints of sexual harassment.

In this regard, plaintiff elected to add four charges against Sgt. Smith during the course of his investigation, each of which was entirely unrelated to Officer Tallman or her internal complaints. The stress of the investigation ultimately caused Sgt. Smith to take an

---

Brown also testified that plaintiff's employment was terminated due to the efforts of certain unnamed subordinate employees who were unhappy because plaintiff held them accountable for their job performance.

[3] Defendant points out that plaintiff's investigation and report were not officially submitted to the EEOC as a response to the 2002 EEOC charge. The deadline for submitting a response to the 2002 EEOC charge was February 20, 2003 and the City submitted its evidence along with its formal Statement of Position on February 18, 2003, more than nine months before plaintiff commenced his investigation and several weeks before he began his employment with the City. As set forth above, the impetus for plaintiff's investigation was a 2003 internal complaint, not the 2002 EEOC charge.

extended leave of absence and seek treatment under the City's Employee Assistance Program. Both the City Administrator and the City Clerk acknowledged feeling that the internal investigation needlessly expanded into these unrelated issues. The evidence supports the conclusion that the City Administrator's statements were general comments about plaintiff's investigation of internal complaints by an employee - not a federal investigation or other proceeding.

The court is well aware that, after defendant has articulated a nondiscriminatory reason for the action, the trier of fact may still consider plaintiff's prima facie evidence and any inferences that can be properly drawn from that evidence to show pretext. Reeves v. Sanderson Plumping Products, Inc., 530 U.S. 133, 143 (2000). As plaintiff points out, it is not necessary for plaintiff to provide further evidence, and he may develop an inferential case from the evidence already in the record. In this case, however, for the reasons set forth in the Report and Recommendation as well as above, plaintiff has failed to do so. Once the comments attributed to the City Administrator by plaintiff are viewed in proper context with the summary judgment record as a whole, it is clear that no reasonable inference of retaliatory animus can be drawn therefrom. See Mize v. Jefferson City Board of Education, 93 F.3d 739, 743—46 (11th Cir. 1996). Therefore, the court finds that the evidence proffered by plaintiff is not sufficient to establish pretext. See Simmons v. Camden County Bd of Education, 757 F.2d 1187, 1188 (11th Cir. 1985) (holding that evidence that school superintendent made comments reflecting his displeasure regarding discrimination charges and the ensuing investigation satisfied the causation element of a prima facie case but "did not . . . relieve [the plaintiffs] of the burden of overcoming any legitimate reasons articulated by the defendants.").

Plaintiff next contends that the Magistrate Judge erred in not concluding that inferences drawn from the temporal proximity of plaintiff's termination to his purported activity supplied the requisite

pretext evidence. The Magistrate Judge properly concluded that temporal proximity supported the "causation" element of plaintiff's prima facie case. In the context of a prima facie case of retaliation, the standard for establishing causation is not onerous: "[T]he causal link element [requires] merely that the plaintiff establish that the protected activity and the adverse action were not wholly unrelated." Id., 757 F.2d at 1189. "It does not follow [however,] that every time a person engages in . . . [a] protected activity within a short time prior to an adverse employment decision that an inference may reasonably be drawn that they were related." Mize, 93 F.3d at 745. "[F]or the link to be made, it must be reasonable to assume that the employer had cause to retaliate." Id.

Here, no reasonable inference of retaliatory animus can be drawn from temporal proximity because there existed no motive to retaliate: The City Administrator, the Mayor, and the City Council all considered that plaintiff resolved Officer Tallman's complaints in a manner favorable to the City. (Williams Decl., ¶¶ 7-8; Mayor Decl. ¶¶ 3—5; Williams Dep., pp. 252—54, 309, 330—31). Once plaintiff's investigation was complete, defendant's attorney informed the EEOC that the City's investigation found no violation of Title VII by Sgt. Smith. In addition, the City's articulated legitimate, non-retaliatory reasons for the termination decision constitute relevant contextual facts which extinguish any inference of retaliatory animus that otherwise could be drawn from temporal proximity. See Stewart v. Happy Herman's Cheshire Bridge, 117 F.3d 1278, 1287 (11th Cir. 1997) (finding no inference of retaliation based on "suspect timing" where numerous acts of alleged insubordination occurred in and around same time period as the protected activity).

Plaintiff then objects to the Magistrate Judge's conclusion that plaintiff failed to rebut defendant's legitimate, non-retaliatory reasons. Plaintiff attempts to show that he was not responsible for the alleged problems. For example, with respect to the I-85 issue, plaintiff contends that a question of fact exists as to pretext because the record reflects that he directed his officers not to patrol the

interstate.[4] Even if plaintiff can show that he was not responsible for the alleged problems, it is undisputed that the City Administrator, the Mayor, and the City Council were genuinely upset with plaintiff because of their perception that he was responsible for problems relating to morale, favoritism and activity on Interstate 85.

Similarly, plaintiff has not proffered any evidence that any decision makers did not reasonably rely upon their genuinely perceived problems in connection with the wage and hour issues. The record demonstrates that the City received complaints about plaintiff's denial of pay to officers for such work as testifying in court and that at least one officer filed a grievance challenging the denial. (Defendant's Statement of Material Facts, ¶¶ 79, 81).

Whether plaintiff was in fact responsible is not an issue here. "Evidence showing a false factual predicate underlying the employer's proffered reason does not unequivocally prove that the employer did not rely on the reason in making the employment decision. Instead it may merely indicate that the employer, acting in good faith, made the disputed employment decision on the basis of erroneous information." Elrod, v. Sears, Roebuck & Co., 939 F.2d 1466, 1548 (11t Cir. 1991). "A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in tact motivated by [retaliatory animus]. "Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1092 (11th Cir. 2004) (citation omitted).

---

[4] The court notes, however, that the undisputed record indicates that the officers, under plaintiff's supervision, not only patrolled 1-85 but also issued citations and engaged in a high speed chase on the interstate. In fact, plaintiff was the impetus for the City's receiving authorization from the State to run radar on 1—85, despite knowing at the time that the City had a strong and long term policy against patrolling the interstate.

With regard to the Dispatcher issue, plaintiff attempts to show pretext by arguing that it was unreasonable for the City to believe that "a number" of Dispatchers were threatening to leave their employment because "only one" Dispatcher testified that she resigned. The City Clerk, however, testified that several Dispatchers complained to her about the working conditions of the Dispatch office and threatened to leave Dispatch. (Faulkner Dep., pp. 61—65). In addition, the City Administrator testified that he received reports front Dispatcher Nora Whitlock and from Fire Marshal Walt Brown that many of the Dispatchers were unhappy and were threatening to leave. (Whitlock Dep., pp. 40-51; Williams Dep., pp. 72, 109—14). The record clearly indicates that, the City Clerk and the City Administrator believed in good faith that a number of Dispatchers were discontent and had threatened to leave.

Plaintiff's argument that a finding of pretext is supported by the City Administrator's use of Sgt. Smith to obtain information confirming patrol activity on 1—85 is without merit. The record reflects that the City Administrator only instructed Sgt. Smith to obtain the pertinent information after initially attempting to obtain it from Chief Brown. Moreover, Sgt. Smith did not engage in "surveillance" as plaintiff alleges but simply obtained public record information - information that plaintiff does not contend to be false.

The court also rejects plaintiff's contention that the City's failure to progressively discipline him constitutes evidence of pretext. Although the City has and utilizes a progressive discipline policy, the City Clerk testified that the City was under no obligation to impose lesser discipline in plaintiff's case. (Faulkner Dep., pp. 41-44). Furthermore, plaintiff has identified no similarly situated employee who received the benefit of progressive discipline under the same or comparable circumstances. See Randle v City of Aurora, 69 F.3d 441, 454 (10th Cir. 1995).

Moreover, plaintiff had "warnings." For example, it is undisputed that City's policy was not to patrol 1-85, and plaintiff

knew of this policy. (Crawford Dep., p. 11). Chief Brown told plaintiff not to allow patrols of P-85. Plaintiff was aware of and warned about FPD patrols on I-85. Even assuming that plaintiff had no "warnings" regarding his performance, under the circumstances of this case lack of "warning" to plaintiff raises no issue. As set forth in detail in the Report and Recommendation, in February and March of 2003, Chief Brown and plaintiff were hired, respectively, after a December 2002 assessment by the Georgia Chiefs of Police Association. That assessment revealed numerous problems with FPD, including officer morale, leadership, staffing, communications, and record keeping. As Major, plaintiff oversaw the operations of the FPD. The bulk of the complaints relating to the wage issue were received by the City between February 7 and February 16, 2004 — in the midst of the other controversies relating to I-85, the Dispatchers and others. During the February City Council meeting where these issues were discussed, the City Administrator and the City Council believed that something major in the department should happen to get things back on track. (Williams Dep. p. 270). As a result, plaintiff was terminated, the position of Major was removed and Chief Brown was placed on probation.

Plaintiff's contention that problems of low morale and favoritism existed prior to his being hired is beside the point, particularly in light of the fact that plaintiff specifically was hired to assist Chief Brown in correcting these problems. The City reasonably expected, at a minimum, that plaintiff would refrain from taking any action that adversely affected morale. The record reflects, however, that the City genuinely determined that certain actions taken by plaintiff - - most notably his supervision of the 'S.T.O.P. Unit" - - directly contributed to low morale and perceptions of favoritism within the department.

That plaintiff lacked knowledge, either through criticism or Council Meetings, of his performance problems does not place the reasonable beliefs of the decision makers in question nor demonstrate pretext. The Chief of Police's positive evaluation of

plaintiff five months before his termination does not cast doubt on any reason for plaintiff's termination because the Chief of Police did not participate in the termination decision. The undisputed evidence shows that plaintiff's issues were raised or came to a head in February 2004, after his positive evaluation.[5] There is no indication that these issues were fabricated or intentionally brought out after plaintiff submitted his investigation report.

Thus, the court concludes that plaintiff failed to demonstrate the existence of genuine issue of material tact with regard to the City's proffered legitimate, non-retaliating reasons for his termination.

Finally, plaintiff contends that the Magistrate Judge erred in not applying a "mixed motive" analysis to plaintiff's Title VII/Participation Clause claim. Under the "mixed motive" analysis, if a plaintiff "demonstrate[s] that an employer used a forbidden consideration with respect to any employment practice," then the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision based on the nondiscriminatory reasons alone. Desert Palace, Inc v Costa, 123 S.Ct. 2148, 2149 (2003). For the reasons set forth in the Report and Recommendation as well as above, plaintiff has failed to proffer sufficient evidence to demonstrate that the Tallman investigation was a factor in defendant's decision to terminate plaintiff. Thus, the Magistrate Judge did not err in forgoing consideration of the "mixed motive" analysis once he found no genuine issue of material fact with regard to pretext.

Therefore, the court hereby ADOPTS the Magistrate Jude's Report and Recommendation, as modified by this order,

---

[5] As noted by the Magistrate Judge, this single evaluation does not indicate a history of positive evaluations.

GRANTING defendant's motion for summary judgment in its entirety.

The Clerk of the court is hereby DIRECTED to CLOSE this case.

SO ORDERED, this 18th day of May, 2006.

CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

Appendix D —United States Magistrate Judge's Order for Service Of Report and Recommendation Entered February 1, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DANIEL CRAWFORD,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION FILE NO.
v.	:	1:04-CV-2590-CAM
	:	
CITY OF FAIRBURN, GEORGIA,	:	[Magistrate Judge Baverman]
	:	
Defendant.	:	

UNITED STATES MAGISTRATE JUDGE'S
FINAL REPORT AND RECOMMENDATION

Before the Court is Defendant's Motion for Summary Judgment [Doc. 27]. For the reasons set forth herein, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment [Doc. 27] be **GRANTED**.

I. INTRODUCTION

Daniel Crawford filed a complaint on September 3, 2004, against the City of Fairburn ("Defendant" or "Fairburn"), alleging (1) retaliation, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, ("Title VII"), and (2) discrimination for the exercise of his First Amendment right of free speech, in violation of 42 U.S.C. § 1983. [Doc. 1]. On August 11, 2005, Fairburn filed a motion for summary judgment as to all claims. [Doc. 27].

II. STATEMENT OF THE FACTS

The pertinent facts of this case at the summary judgment stage, construed in the light most favorable to Plaintiff as the non-moving party,[1] are as follows: Fairburn employed a City Administrator, James Williams, who was responsible for the Fairburn's day-to-day operations, and a City Clerk, Nancy Faulkner, who was responsible for human resources and personnel matters. (D ¶¶ 3-4).[2] In September 2002, Officer Louise Tallman of the Fairburn Police Department ("FPD") filed an internal complaint, alleging that FPD Sergeant James Smith engaged in sexual harassment. (D ¶ 5). [Doc. 27 at Exh. 2]. On December 17, 2002, Tallman filed an EEOC complaint against the city, alleging age and sex discrimination because of Smith's harassment. (D ¶ 7). [Doc. 27 at Exh. 3]. Fairburn responded to the EEOC complaint on February 18, 2003. (D ¶ 15). On December 11, 2003, the EEOC issued a determination that it was more likely than not that Tallman experienced sexual harassment based on her September 2002 complaint. (D ¶ 29).

In the Fall of 2002, Fairburn arranged to have the Georgia Chiefs of Police Association perform an assessment ("assessment") of the FPD due to problems in the FPD. (P ¶ 1-2). The December 2002 assessment indicated that the "primary problem" in the FPD was animosity toward the then-Chief and Captain, resulting from low pay, perceived unfairness in discipline, and uneven enforcement of

---

[1] In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1085 (11th Cir. 2004) (citing *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999)).

[2] Paragraph numbers preceded by "D" refer to paragraphs in "Defendant's Statement of Undisputed and Material Facts as to Which no Genuine Issues of Fact to be Tried Exist." [Doc. 27]. Paragraphs preceded by "P Resp." refer to paragraphs in "Plaintiff's Response to Defendant's Statement of Undisputed and Material Facts as to Which no Genuine Issues of Fact to be Tried Exist." [Doc. 48], and those preceded by "P" refer to paragraphs in "Plaintiff's Statement of Material Facts as to Which Create a Genuine Issue for Trial." [Doc. 49].

rules. (Assessment in Doc. 27, Exh. 4 at 11). The assessment also revealed problems with officer morale, leadership, staffing, equipment, facilities, communications, and records. (P ¶ 3).

In February 2003, Fairburn hired Frederick Brown to serve as its Chief of Police, a position he held until June 16, 2004. (D ¶ 9). Williams believed that it would take two to three years to implement the assessment's recommendations, and he expected Chief Brown to at least implement them, if not go beyond them. (Williams Dep. at 54-55).

Around March 10, 2003, upon Chief Brown's recommendation, Williams hired Plaintiff to serve as a Major in the FPD. (D ¶¶ 13-14). As Major, Plaintiff oversaw the operations of the FPD, including the Detective and Patrol Divisions, the dispatchers, and the court personnel, and he was responsible for fleet maintenance, interviews, performance evaluations, training, and internal affairs ("IA") investigations. (D ¶ 16). Plaintiff recommended the formation of the STOP (the Safety Traffic Occupant Protection) unit, (Crawford Dep. at 97)), which would perform special activities including working traffic accidents, running radar, filling in for patrol officers, and backing up officers. (D ¶ 20). Plaintiff also chose its members. (D ¶ 21). Plaintiff did not consult Faulkner, Williams, or City Hall to create the STOP unit because Chief Brown approved its formation, the unit merely involved shift and duty assignments, and assignment to the unit did not lead to a pay raise. (Crawford Dep. at 165).

Fairburn had a long standing policy not to patrol I-85. (Hannah Decl. ¶ 6 in Doc. 32). When Plaintiff initially started working at the FPD, Fairburn had not received State approval to monitor I-85, and FPD officers understood that they were not to be on I-85. (Crawford Dep. at 172-73, 179). In December 2003, the FPD was given a radar permit for FPD officers to monitor I-85,[3] but

---

[3] Plaintiff was interested in having authority to patrol I-85 for drug

Chief Brown told Plaintiff not to patrol I-85 and Plaintiff understood that City Council did not want the FPD on I-85. (D ¶ 27; Crawford Dep. at 181). Plaintiff did not authorize FPD officers to patrol I-85, but Plaintiff knew that FPD officers issued citations to motorists on I-85 and periodically drove on I-85. (D ¶¶ 73-74; P ¶ 102). Several FPD officers made multiple traffic stops on I-85 since November 2003. (Williams Decl. ¶ 13 in Doc. 27 at Exh.1).[4] Williams met with Chief Brown about I-85 stops in 2003. (P ¶ 106). After numerous requests, without a response, to Chief Brown that he provide records of I-85 stops, Williams asked Smith to provide the records. (Williams Decl. ¶¶ 11-12 in Doc. 27 at Exh.1). After Williams asked Smith to provide the documents, on February 25, 2004, Chief Brown provided the records for I-85 stops. (Williams Decl. ¶ 13 in Doc. 27 at Exh.1).

In November 2003, Tallman filed another internal complaint against Sergeant Smith, alleging that Smith sexually harassed her at a firing range by standing too close behind her as she tried to qualify with her weapon. (D ¶¶ 30-31; P Resp. ¶ 30; Crawford Dep. at 257-58). Tallman also stated, "I fully believe Sergeant Smith's actions are the direct response to a still *unresolved* sexual harassment complaint I filed against him more than a year ago." [Doc. 27 at Exh. 11 (emphasis in original)]. Tallman reported that she forwarded her November complaint to the EEOC. [*Id.*]. Plaintiff understood Tallman's complaint to be a request for resolution of both the September 2002 complaint and the November 2003

---

interdiction purposes, motorist assistance, and dealing with abandoned vehicles. (Crawford Dep. at 181-82). Plaintiff assigned the task of getting approval to monitor I-85, as well as to reassess all streets, to Officer Chris Pigor. (*Id.* at 184). The State first had to grant approval, and Fairburn then had to review the approval and return paperwork to the State. (*Id.* at 189-91). When Plaintiff asked Chief Brown when FPD officers could patrol I-85 following approval to monitor it from the State, Chief Brown told Plaintiff to wait. (*Id.* at 194-95).

[4] Records indicate that between November 1, 2003, and February 7, 2004, there were 35 traffic stops on I-85 or on the I-85 exit ramps. (Williams Decl. at Exh. B in Doc. 27 at Exh.1).

complaint. (Crawford Decl. ¶ 7 in Doc. 50 at Exh. 9).

Plaintiff's investigation involved reviewing documents and speaking to individuals regarding Tallman's 2002 complaint. (D ¶¶ 33-34). In December 2003, Williams learned that Plaintiff was assigned to conduct an internal investigation, and Fairburn's mayor, Betty Hannah, learned that Plaintiff was investigating Tallman's November complaint against Smith. (Williams Decl. ¶¶ 3-4 in Doc. 27 at Exh.1; Hannah Decl. ¶ 3 in Doc. 32). Plaintiff conducted taped interviews with 23 to 25 FPD employees that lasted an average of 15 to 30 minutes. (D ¶ 49; Crawford Decl. ¶ 13 in Doc. 50 at Exh. 9). Plaintiff informed Smith that the investigation would include the harassment complaint and charges of insubordination, failure to support department, and engaging in gossip/rumors. (D ¶ 35); [Doc. 27 at Exh. 13]. Plaintiff then added charges to his investigation after acquiring information during the course of his examination. (*Id.* at 277-78).

On December 23, 2003, Plaintiff met with Chief Brown, Williams, and Fairburn attorneys to discuss the Tallman investigation. (Crawford Decl. ¶ 19 in Doc. 50 at Exh. 9). Following the meeting, the City Attorney wrote a letter to the EEOC indicating that conciliation for Tallman's December 2002 complaint should be delayed until after the conclusion of Plaintiff's investigation into Smith's conduct. [Doc. 50 at Exh. 27].

In another December meeting with Williams and Chief Brown, Williams stated that: (1) it was Plaintiff's fault that the EEOC investigation was occurring; (2) Plaintiff "opened up a can of worms"; and (3) Plaintiff's investigation was going to get Fairburn sued. (Crawford Decl. ¶¶ 20-21 in Doc. 50 at Exh. 9). Plaintiff only spoke with Williams, the City Attorney, and perhaps Faulkner about the investigation process, not the subject matter of the investigation. (Crawford Dep. at 29-30).

Around January 22, 2004, Plaintiff provided Chief Brown with a completed investigation report, consisting of a one page summary report and over 400 pages of attachments, which Brown then gave to Williams. (D ¶ 50). The one page Summary Report on Sergeant Smith stated in full:

[This Space Intentionally Left Blank]

Summary Report

Name: Sgt. James Russ Smith
DOB: 09-02-56

Charges/Findings

Verbal Harrassment.	Sustained Other.
Hostile Work Environment.	Not Sustained.
Insubordination – Disrespectful Conduct.	Sustained.
Duty to support Dept. and all members thereof.	Sustained.
Duty to suppress Mutinous Conduct.	Not Sustained.
Gossip/Rumors	Sustained.
Duty to Not Give False or Misleading Information	Sustained.

Sgt. Smith refused to provide complete and truthful answers to question at his interview on December 24 2003.

As stated to Lt. Pollard, he refused to answer question number five as he did in his interview with this office. This is a violation of Garrity under Advice of Rights and Responsibilities # 2

See list of questions and his Pre-Test interview with Lt. Pollard.

Sgt. Smith has violated #8 listed in Garrity in making contact with others about this case after signing that he understood what the Garrity form was and what could happen if he violated it.

As seen in his own statements and interview with this office on December the 24th he would not give complete truthful answers to questions at least sixteen times, See the Pre-Test of Lt. Pollard.

This is a violation of # 3 of the Advice of Rights and Responsibilities

Statements are listed in the index

/s/
Major Daniel Crawford
01-22-04

(Investigative Report in Doc. 50, Exh. 6 at TC-0006). The summary report's conclusions of "sustained," "sustained other," and "not sustained" are derived from the FPD's standard operating procedures. (Crawford Dep. at 283). "Sustained other" is defined as "[t]he investigation indicates that misconduct other than that charged occurred"; "sustained" is defined as "[t]he allegation is supported by sufficient evidence"; and "not sustained" is defined as "[i]nsufficient evidence to either prove or disprove the allegation." (Investigative Report in Doc. 50, Exh. 2 at TC-0007).

Plaintiff's conclusion for "sustained other" for the verbal harassment allegation was in reference to Smith standing too close to Tallman at the firing range, which Plaintiff believed to be intimidating conduct. (Crawford Dep. at 284). The verbal harassment charge stemmed from Tallman's original complaint in September 2002. (*Id.* at 286). Plaintiff interpreted the hostile work environment charge to mean that Tallman did not feel safe, and he believed the charge derived from the September 2002 incident as well. (*Id.* at 288). Plaintiff explained the summary report as follows:

> Q. . . . What I am asking you is you just testified that the two references, the reference to verbal harassment and the reference to hostile working environment on this summary report both pertain to events that transpired in 2002?
>
> A. The verbal harassment pertains to 2002. Sustained other, which would have been the intimidation factor would pertain to the second complaint.
>
> Q. But focusing on the column of charges, you don't have a charge here that relates to anything that happened in 2003, do you?
>
> A. No - - yes. That. I, the whole investigation starts from 2002 to this date. That's the whole

investigation.

Q. But - -

A. It is not two separate investigations.

Q. But focusing on the part of the investigation that was, that was limited to harassment of any type, you understood she wasn't complaining of verbal harassment that took place on November 14th, 2003, right?

A. No. She was just complaining about the intimidation at the range.

Q. So my question to you is why did you categorize the harassment claim as verbal harassment when you knew that she wasn't complaining about verbal harassment in November 2003?

A. Because in 2002, she did.

Q. That's not my - -

A. There's no disposition.

Q. That, that could be a separate issue, couldn't it?

A. It could be, yes.

Q. Well for some reason, you chose to omit any reference to nonverbal harassment or intimidation or whatever you want to call it that took place in 2003 as a separate charge?

A. Right.

Q. And instead put a reference to verbal harassment which referred back to 2002?

A. Correct.

Q. And then you don't sustain that, but you sustain other, and that's the reference to what happened in 2003?

A. Correct.

. . .

Q. So this charge of hostile work environment does not relate to any allegations of hostile work environment that she included in her November 2003 complaint?

A. Right.

. . .

Q. . . . . You also, you omitted any reference under the charge column to a hostile work environment charge that she brought relating to the incident that took place in November 2003?

A. I listed the charges, the comments that she made that she was concerned with from 2002 and 2003 and just put them all together. I did not break them down and say this occurred in 2002, this occurred in 2003, if that's what you are asking.

Q. But it looks like you did break down the verbal harassment reference because you just, if you admitted that there was not allegation of verbal harassment that took place in 2003?

A. Right. It was intimidation. And if you need, the, the thing, it doesn't have to be verbal harassment. It can be intimidation. It is harassment.

Q. But this doesn't say harassment, does it?

A. It says verbal harassment.

Q. That's right.

A. It doesn't say verbal intimidation harassment.

(*Id.* at 289-93). Plaintiff investigated the 2002 complaint as well because Tallman represented that the FPD had not resolved her the complaint and there was no documentation that it was finished. (*Id.* at 296-97).

Plaintiff based his decision to sustain the disrespectful conduct allegation on Smith's verbal comments to Tallman, which Plaintiff believed to be based on gender. (Crawford Decl. ¶ 27 in Doc. 50 at Exh. 9). Plaintiff did not sustain the hostile work environment claim because he believed that hostile work environment dealt with employee safety. (*Id.* ¶ 28). Plaintiff discussed his conclusions only with Chief Brown. He never discussed his findings with Tallman or Smith. (Crawford Dep. at 27, 270-71).

Attached to the summary report were 400 pages of documentation including the following: (1) Smith's November 2003 complaint, (Investigative Report in Doc. 50, Exh. 6 at TC-0010);

(2) a December 1, 2003, memorandum from Williams to Chief Brown stating that after the previous FPD Chief's retirement, Williams told Smith that the past would be put behind him but that future conduct would be addressed, (*id.* at TC-0012); (3) Tallman's September 13, 2002, complaint and statements for witnesses involving Smith's harassment, (*id.* at TC-0013 - TC-0020); (4) transcripts of administrative investigative interviews with various FPD officers including, Tallman, (*id.* at TC-0021 - TC-0032),[5] Smith, (*id.* at TC-0073 - TC-0114),[6] Detective Sid Brown, (*id.* at TC-0205 - TC-0220), and 22 other FPD employees, (*id.* at TC-0222 to TC-0432)[7]; (5) a February 2003 letter from Tallman to the EEOC in which Tallman updated the EEOC of the former FPD chief's resignation and her reassignment, (*id.* at TC-0035); (6) Tallman's December 2002 EEOC charge, (*id.* at TC-0036 - TC-0039); (7) the December 11, 2003, EEOC determination, (*id.* at TC-0040); (8) the EEOC's response to an inquiry from Senator Zell Miller's officer regarding Tallman, (*id.* at TC-0043); (9) e-mails to Williams from the prior FPD Chief regarding Smith and Tallman's EEOC complaint, (*id.* at TC-0046 - TC-0050); (10) FPD rules and

---

[5] Plaintiff asked Tallman about her September 2002 complaint, (Investigative Report in Doc. 50, Exh. 6 at TC-0022 - TC-0027), the November 2003 incident with Smith, (*id.* at TC-0027 - TC-0028), her belief about whether Smith violated departmental policies regarding insubordination, disrespectful conduct, suppressing mutinous conduct, passing along gossip, and making comments about other women, (*id.* at TC-0028 - TC-0029).

[6] During the interview, Smith stated that Tallman expressed feeling crowded at the firing range, so he left the area. (D ¶¶ 45-46). Also, Smith stated, *inter alia*, that: (1) he discussed with others how Tallman was hired without a hiring board, (Investigative Report in Doc. 50, Exh. 6 at TC-0086), (2) Plaintiff had many of the qualities of the former FPD chief, (*id.* at TC-0090); (3) he made derogatory statements about individuals in dispatch, (*id.* at TC-0097); and (4) he was sure that he made a derogatory remark about Tallman at some point in time, (*id.* at TC-0103).

[7] Some of these other FPD employees indicated that Smith made the following comments about Tallman: "worthless"; "useless"; "wasted uniform"; "don't understand why they hired her"; "doesn't do shit"; and "a waste of taxpayer money." (Crawford Decl. in Doc. 50, Exh. 9 ¶ 16).

regulations regarding insubordination, mutinous conduct, gossip, and harassment, (*id.* at TC-0057 - TC-0070, TC -0129 - TC-0133); (11) Smith's psychological evaluation for fitness for duty, (*id.* at TC-0139 - TC-0154); and (12) Smith's interview with Lt. Pollard, a Voice Stress Examiner, (*id.* at TC-0159 - TC-0183).[8] Plaintiff's Summary Report was the only document in which he presented his findings while the remainder of the investigatory report comprised supporting materials. (Crawford Dep. at 218). Plaintiff intended his summary report to serve as only a small part of his investigative material because he anticipated that Williams, Faulkner, Hannah, and city council members would review the entire investigation. [Doc. 50, Exh. 9 ¶ 26].

Plaintiff believed that Smith harassed Tallman because of her gender. (Crawford Decl. ¶ 25 in Doc. 50 at Exh. 9). Plaintiff only verbally discussed his report with Chief Brown, and he did not attempt to publicize his internal investigation report beyond his chain of command. (D ¶¶ 52, 66).

Williams read the Summary Report, which he interpreted as finding no discrimination or harassment due to the firing range incident because the hostile work environment claim was not sustained.[9] Williams then provided the report to Faulkner for review, so that she could determine what the "Sustained Other" conclusion meant regarding the verbal harassment charge. (D ¶¶ 56, 59; Williams Decl. ¶ 5 in Doc. 27 at Exh.1). Faulkner read the report

---

[8] Smith testified in the interview with Pollard, *inter alia*, that: (1) Tallman was worthless in a certain position, (Investigative Report in Doc. 50, Exh. 6 at TC-0167); (2) it was a waste of money to pay Tallman to do a certain job, (*id.*); and (3) his criticisms of Tallman related to her job, not her personally, (*id.* at TC-0171-TC-0172).

[9] Williams took issue with Plaintiff's investigation because: (1) it reviewed incidents that occurred before Chief Brown's arrival; (2) there were reports of improprieties in examining witnesses; (3) it took Plaintiff a long time to provide the results of his investigation; and (4) less time could have been devoted to the task to obtain the same results. (Williams Dep. at 252-53).

and its supporting documents over several days and spoke to Chief Brown about the investigation's conclusions regarding the verbal harassment claim. (D ¶ 60; Faulkner Dep. at 94). Faulkner concluded that the report found no evidence of unlawful discrimination or harassment, but found evidence of other violations. (Williams Decl. ¶ 6 in Doc. 27 at Exh.1; Faulkner Decl. ¶ 5 in Doc. 34). Based on Faulkner's report, Williams believed that the charges that were sustained related to matters before Chief Brown's employment, which were not supposed to be investigated. (Williams Dep. at 260-61). Chief Brown told Faulkner that the "Sustained Other" finding related to Tallman's September 2002 complaint, but that there was no finding of sexual harassment. (Faulkner Dep. at 95-96). Williams then informed Mayor Hannah that Plaintiff's report found no evidence of harassment. (Williams Decl. ¶ 8 in Doc. 27 at Exh.1; Hannah Decl. ¶ 5 in Doc. 32). Fairburn's attorney informed the EEOC in a letter dated March 1, 2004, that Fairburn's investigation into Smith was complete, there was no evidence of Title VII violations by Smith, Tallman's complaints were properly addressed, and a meeting with the EEOC would follow as scheduled. (Letter dated 3/1/04 in Doc. 50 at Exh. 28).

The dispatcher office employed between five and six dispatchers. (Baker Dep. at 36-37). In December 2003, Plaintiff terminated dispatcher, Nicole Wood-Norman ("Norman"), because: (1) she failed to provide a doctor's excuse for her absence; (2) she called in sick at the last minute; (3) she stayed home because she had no baby sitter and her child was sick; and (4) she used her private e-mail and internet for personal reasons at work. (Crawford Dep. at 317, 319). Dispatchers testified that Norman was unreliable because of her absences and her last minute notices. (Baker Dep. At 30-31; Faillo Dep. at 42; Whitlock Dep. at 38). However, Fairburn reinstated Norman. (D ¶ 68). In February 2004, Norman went to Faulkner and threatened to resign immediately because she was "fed up" with the environment, but following her discussion with Faulkner, gave two weeks notice. (Norman Dep. at 48-49, 53-55, 58). The dispatchers testified that other than Whitlock having

concerns about a potential change to a 12-hour schedule, they were unaware of dispatchers threatening to resign. (Faillo Dep. at 40; Baker Dep. at 45-46; Norman Dep. at 84-85; Whitlock Dep. at 37-38). However, Whitlock stated that dispatchers indicated that they might leave if there was a change to a 12-hour shift or if they did not receive more help. (Whitlock Dep. at 66-67).

Dispatchers also testified that they were unhappy with their employment due to: (1) Crawford made Peggy Wallace the dispatch supervisor; (2) the department was understaffed; (3) the conditions of the dispatcher room; (4) performance of other dispatchers; (5) scheduling; and (6) Wallace's evaluations. (Baker Dep. at 16-18, Faillo Dep. at 20-21, Norman Dep. at 52-53, Whitlock at 33-34). When Norman discussed resigning with Faulkner, she expressed generally about people having problems with scheduling. (Norman Dep. at 53). Faillo informed Faulkner about the appointment of Wallace as the dispatcher supervisor shortly after Wallace became supervisor. (Faillo Dep. at 36-37). In a meeting with Williams at some point toward the end of Plaintiff's tenure, Whitlock told Williams that: (1) there were problems with morale; (2) Wallace was not the right person to be a supervisor but if she was removed from the position, she would leave, which would be detrimental to the dispatcher office; (3) the younger dispatchers formed their own grouping; and (4) she was concerned about the installation of a new computer system. (Whitlock Dep. at 42-48). Whitlock also informed Williams in the meeting that Wallace was serious about leaving if there was a change to a 12-hour shift. (*Id.* at 66-67).

Beginning in November 2003, Williams informed Chief Brown of his dissatisfaction with the STOP unit because the unit caused an increase in traffic citations, led to discontent in the FPD, violated the City's policy against running radar on I-85, engaged in a high speed chase on I-85, and exercised poor judgment. (D ¶¶ 75-77; Williams Dep. at 82-87). In a February 6, 2004, meeting with Chief Brown, Williams expressed his dissatisfaction with the performance of the FPD, including, for the first time, the performance of Plaintiff

and Chief Brown. He also mentioned removing Smith from the FPD and separating Smith from Tallman due to Plaintiff's investigation. (D ¶ 78, Brown Dep. at 44, 53-54). Williams did not provide specific reasons concerning FPD's problems. (Brown Dep. at 44, 52-53, Exh. 3).

In February 2004, Chief Brown disbanded all special units and assignments with the FPD. (D ¶ 79). FPD officers then complained that former STOP unit officers received more favorable treatment than other officers because they did not have to bid on shifts. (*Id.*).

On February 27, 2004, the Fairburn Mayor and City Council held a special meeting, which Plaintiff and Chief Brown did not attend, to address resignation threats by dispatchers. (D ¶ 94; P ¶ 108). Before the meeting, Mayor Hannah received complaints from FPD officers that FPD officer morale was low, Plaintiff's STOP unit received preferential treatment, and a number of FPD officers made multiple traffic stops on I-85. (Hannah Decl. ¶¶ 7, 9 in Doc. 32). The minutes from the meeting reflected that Williams discussed ongoing issues of concern with the Police Department, including: staff discontent,[10] favoritism in assignments, poor judgment by management, communication problem between the FPD staff and City Hall,[11] problems relating to pay and vacation,[12] staff

---

[10] Faulkner heard over four officers complain about stress due to Plaintiff. (Faulkner Dep. at 58), as well as a dispatcher complain about strife in the dispatcher following Crawford's decision to promote a dispatcher to a supervisory position. (*Id.* at 60-61). Also, Norman complained about Plaintiff's decision to terminate her. (*Id.* at 64-65). Williams indicated that there were three resignations in the dispatcher department and three more expressed that they were on the verge of resigning in late 2003 or early 2004. (Williams Dep. at 106-07). Also, he stated that the dispatchers believed that the schedule was unfairly assigned and took issue with the designation of a supervisor. (*Id.* at 109, 145-47). Further, training was unevenly provided. (*Id.* at 153-55).

[11] Williams and City Hall desired a good reporting system for the FPD

grievances with threats of litigation[13] and formal complaints, violation of city policies, including monitoring I-85, and creation of a special unit without approval from City Council. (Minutes from Special Meeting in Doc. 50 at Exh. 19). During the meeting, Williams recommended that Plaintiff be fired because Williams and the Council believed that something major in the department should happen to get things back on track.[14] (P ¶ 115; Williams Dep. at 270). Plaintiff spoke with two City Council members regarding FPD issues, including I-85. (D ¶ 89).

Following the February 27 City Council meeting, the Mayor and City Council removed the Major position and placed Chief Brown on probation. (D ¶ 90). Williams then met with Chief Brown and indicated that Plaintiff's termination was a result of: (1) dispatcher Norman; (2) I-85; (3) overtime; and (4) the accuracy of Plaintiff's investigation. (D ¶ 95). Williams allowed Chief Brown

---

activities and accomplishments, but never received good reporting, only superficial reports. (Williams Dep. at 171).

[12] Prior to Chief Brown's arrival, Fairburn had to pay a large sum of backpay for not paying overtime for mandatory staff meetings. (Faulkner Dep. at 93). Also, during Chief Brown's tenure, FPD officers, including Cowart and Detective Brown, complained about not being paid for training or court appearances. (*Id.*; Williams Dep. at 130-31, 135-37, 139-41). Williams also cited complaints of time sheets being altered as a problem. (Williams Dep. at 127-28, 138). Chief Brown indicated that the FPD had overtime issues with a number of people, but Williams, Mayor Hannah, or City Council only mentioned overtime in reference to the FPD budget. (Brown Dep. at 128, 149). No one ever discussed wage problems with Plaintiff. (Crawford Decl. ¶ 40 in Doc. 50 at Exh. 9).

[13] An FPD officer who did not receive pay for court appearances and another who was not paid for his services threatened suit. (Williams Dep. at 180-83). Also, a trainee who failed to qualify at the firing range threatened to sue. (*Id.* at 183). A male officer claimed that Plaintiff was harassing him and threatened suit. (*Id.* at 186-87).

[14] Fairburn had a progressive discipline system in which an employee is coached, so that he can improve his behavior and performance. (Faulkner Dep. at 41). However, there were cases where Fairburn would skip the coaching and terminate the employee. (*Id.*).

to give Plaintiff the option of resigning instead of being fired. (*Id.*). Chief Brown did not believe that Plaintiff had done anything wrong to merit termination because Plaintiff had performed well. (Brown Dep. at 121). Chief Brown then gave Plaintiff the option of resigning instead of being fired and told Plaintiff that the decision was based on (1) the accuracy of the investigation of Tallman's complaints; (2) the I-85 incidents; and (3) problems with Norman. (D ¶ 96; P ¶ 125). Plaintiff then resigned. (D ¶ 97).

Prior to Plaintiff's resignation, Plaintiff never received any criticisms from Brown, Williams, or the City Council. (P ¶ 93). In the Fall of 2003, Plaintiff received a performance evaluation score of 4.25 out of 5, was praised as being "an excellent manager" by Chief Brown, and received a pay raise. (P ¶ 94). [Doc. 50, Exh. 12].

III. SUMMARY JUDGMENT STANDARD

Summary judgment is proper when no genuine issue as to any material fact is present, and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). The movant carries the initial burden of "informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact." *Rice-Lamar v. City of Fort Lauderdale*, 232 F.3d 836, 840 (11th Cir. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

The nonmovant is then required "to go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary

judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id.; see also EPL Inc. v. USA Federal Credit Union*, 173 F.3d 1356, 1362 (11th Cir. 1999); *Duke v. Cleland*, 884 F. Supp. 511, 514 (N.D. Ga. 1995).

IV. DISCUSSION

A. Statutory Frameworks

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to, *inter alia*, discriminate against an employee "[(1)] because he has opposed any practice made an unlawful employment practice by this subchapter, or [(2)] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). These two prohibitions on retaliation are generally known as the opposition clause and the participation clause, respectively. *E.E.O.C. v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000).

Section 1983 provides that every person who, under color of state law, subjects or causes to be subjected any person within the jurisdiction of the United States "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. "To state a claim under § 1983, a party must . . . prove a violation of a particular constitutional or federal statutory provision." *U.S. Steel, LLC, v. Tieco, Inc.*, 261 F.3d 1275, 1288 (11th Cir. 2001).

B. Title VII Retaliation

A plaintiff asserting a claim of retaliation in violation of Title VII must establish a *prima facie* case by showing "(1) that he

engaged in statutorily protected expression; (2) that he suffered an adverse employment action; and (3) that there is some causal relationship between the two events." *Holifield v. Reno*, 115 F.3d 1555, 1566 (11th Cir. 1997). The plaintiff is not required to prove the underlying claim of discrimination that led to his protected activity, but he "must have had a reasonable good faith belief that the discrimination existed." *Id.* If the plaintiff establishes the *prima facie* case, an inference of retaliation arises, and the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its employment decision. This burden is "exceedingly light." *Id.* at 1564. If the defendant does so, the inference of retaliation is erased, and the burden shifts back to the plaintiff to show that the defendant's articulated reason is merely a pretext for retaliation. *Id.* at 1566. Despite this burden-shifting framework, the plaintiff has the "ultimate burden" of establishing that the defendant intentionally retaliated against him. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Wallace v. Sparks Health System*, 415 F.3d 853, 860 (8th Cir. 2005) ("The plaintiff then bears the ultimate burden of showing that the employer's proffered reason was a mere pretext for a retaliatory motive.").

1. Prima Facie Case[15]

a. Protected Activity - - Opposition Clause

Defendant argues that Plaintiff cannot establish protected activity under the opposition clause because: (1) he never communicated his belief that the practices were unlawful; (2) he did not have an objectively reasonable, good faith belief that Smith's

---

[15] Fairburn apparently concedes, and the Court agrees, that Plaintiff's resignation in the face of being terminated was an adverse employment action. *See, e.g., Balmer v. HCA, Inc.*, 423 F.3d 606, 615 (6th Cir. 2005) (indicating that a forced resignation is an adverse employment action); *Barnes v. Hillhaven Rehab. & Convalescent Ctr.*, 686 F. Supp. 311, 313 (N.D. Ga. 1988) (stating that plaintiff experienced an adverse employment action when she was told that she would either have to resign or be fired).

actions constituted sexual harassment. [Doc. 27 at 11-16].

"Opposition clause acts. . . are taken in the context of the ordinary business environment and involve employers and employees as employers and employees." *Total Sys. Servs., Inc.*, 221 F.3d at 1176. To establish retaliation under the opposition clause, the plaintiff must: (1) place the employer on notice that he is complaining of unlawful practices; and (2) have a reasonable, good faith belief that discrimination occurred.

i. Placing Employer on Notice

Defendant contends that Plaintiff never communicated a belief that Smith's actions were unlawful but instead determined that no sexual harassment occurred and found no evidence of wrongdoing. [Doc. 27 at 11-14; Doc. 72 at 6-9].

In opposing unlawful conduct, the plaintiff must place the employer on notice that he is complaining of unlawful conduct and not merely making a personal grievance. *See Reynolds v. Golden Corral Corp.*, 106 F. Supp. 2d 1243, 1253-54 (M.D. Ala. 1999). In other words, "the employee's communications to the employer [must] sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner." *Id.* (quoting *Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 559-60 (D. Kan. 1995)); *see also Wehunt v. R.W. Page Corp.*, 352 F. Supp. 2d 1342, 1357-58 (M.D. Ga. 2004) ("At a minimum, an employee must communicate to [his] employer [his] belief that discrimination was occurring. It is not enough to simply complain in a racially neutral way about an employer's practices, and then expect the employer to speculate as to whether such complaints may be motivated by an employee's subjective and undisclosed belief that the employer was engaged in race discrimination."). Specific instances of opposing conduct include "complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the

worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer - - e.g., former employers, union, and co-workers." *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579-80 (6th Cir. 2000) (citing the EEOC Compliance Manual, (CCH) ¶ 8006); *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990) (indicating that the opposition clause protects the following: "making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges"). Such conduct is protected even if the plaintiff has a duty to express concerns about unlawful employment practices. *See Johnson*, 215 F.3d at 579.

The Court concludes that Plaintiff failed to place Fairburn on notice that he was opposing Smith's conduct toward Tallman. First, the investigative report fails to show that Plaintiff opposed Smith's conduct against Tallman. The Summary Report is vague and unclear in that Plaintiff did not sustain the hostile work environment claim and described the verbal harassment claim as "sustained other." (*See* Investigative Report in Doc. 50, Exh. 6 at TC-0006). Thus, on its face, the report does not give notice of Plaintiff's opposition to Smith's alleged sexual harassment. The Court recognizes that Plaintiff believed that Smith sexually harassed Plaintiff and the hostile work environment involved Tallman feeling safe. (Crawford Dep. at 288; Crawford Decl. ¶ 25). Not only does the summary report not clearly indicate that this was Plaintiff's conclusion because there is no mention of the word "sexual harassment," but the conclusion "sustained other" meant that "[t]he investigation indicates that misconduct other than that charged occurred," (*see* Investigative Report in Doc. 50, Exh. 6 at TC-0006). An individual reviewing the summary report could not conclude that Plaintiff was complaining about sexual harassment because it is simply unclear and fails to explain the findings.

Plaintiff contends that a review of the entire investigation would have alerted someone of his belief. [Doc. 50 at 19-21].

However, the investigation materials consisted of over 400 pages of material, which included, *inter alia*, transcripts of interviews, Tallman's complaints, and EEOC reports and determinations. Plaintiff's report never explains why he presented these materials, leaving the recipient to infer the importance of the material and to determine which portions of these materials are relevant. The vague summary report and the large amount of unexplained documents simply fail to place anyone on notice that Plaintiff was opposing Smith's sexual harassment. *See Reynolds*, 106 F. Supp. 2d at 1253-54.

Second, there is no evidence that Plaintiff orally explained his report to anyone other than Chief Brown. (D ¶¶ 52, 66). Plaintiff's failure to clarify his vague report findings prevents Plaintiff from showing that the Defendant was on notice that he was opposing Smith's conduct. *See id.* Although Plaintiff may have explained his report to Chief Brown, Plaintiff has not made the Court aware of any evidence that Chief Brown explained the findings to anyone else. [*See generally* Doc. 50 at 18-21]. The Court's review of the depositions revealed testimony that Chief Brown informed Faulkner that the verbal harassment finding of "Sustained Other" related to Tallman's 2002 complaint, but Chief Brown also said that there was no sexual harassment. (Faulkner Dep. at 95-96). Therefore, there is no evidence that Defendant knew that Plaintiff was opposing Smith's sexual harassment.

Finally, there is no evidence to suggest that Williams, who ultimately informed City Council and Mayor Hannah about the problems in the police department, believed that Plaintiff was complaining about sexual harassment. Williams only read the summary report, which as described above, did not put him on notice of Plaintiff's opposition. In fact, Williams was not certain what the report concluded, so he had Faulkner read the materials. (D ¶¶ 56, 59; Williams Decl. ¶ 5 in Doc. 27 at Exh.1). Faulkner then reported that Plaintiff's investigation found no unlawful activity. (Williams Dep. at 260-61). Thus, Williams and, by extension, the City Council

and Mayor Hannah, did not have notice of Plaintiff's opposition. Without any clear notice of opposition to Fairburn, Plaintiff cannot establish that he gave notice of his opposition so as to establish protected activity under the opposition clause.

ii. Reasonable Belief

Even if Plaintiff provided notice of his opposition, Defendant argues that Plaintiff could not have reasonably believed that Smith's actions constituted sexual harassment because: (1) under the objective standard, two incidents over a one year period cannot constitute sexual harassment; and (2) under the subjective standard, Plaintiff found no evidence of sexual harassment. [Doc. 27 at 14-15]. Plaintiff responds that his belief was objectively reasonable because the EEOC determined that sexual harassment more reasonably than not occurred and he submitted an extensive investigation into the sexual harassment. [Doc. 50 at 21-22].

A plaintiff must have a reasonable belief that the activity about which she complains was a violation of Title VII. *See Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999). In other words, "[t]o recover for retaliation, the plaintiff 'need not prove the underlying claim of discrimination which led to [his] protest,' so long as []he had a reasonable good faith belief that the discrimination existed." *Meeks v. Computer Assoc. Int'l*, 15 F. 3d 1013, 1021 (11th Cir. 1994) (quoting *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1494 (11th Cir. 1989)). "[I]t is insufficient for a plaintiff 'to allege his belief in this regard was honest and *bona fide*; the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable.'" *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1998) (quoting *Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997)). In examining the objective reasonableness, the Court must determine what conduct a plaintiff knew of, not the actual conduct that the harassed suffered. *See Clover*, 176 F.3d at 1352 ("[W]hat counts is only the conduct that

person opposed, which cannot be more than what she was aware of.").

The Court concludes that Plaintiff did not have a reasonable belief to conclude that Smith's conduct constituted sexual harassment. The Court initially disagrees with Defendant's statement that Plaintiff did not have a subjective belief that Smith's conduct was sexual harassment, because Plaintiff clearly indicated that he concluded that Smith's conduct constituted sexual harassment. (Crawford Decl. ¶ 25). However, Plaintiff's subjective belief does little to show that it was objectively reasonable for him to believe that Smith's conduct constituted sexual harassment.

Instead, the Court must measure "[t]he objective reasonableness of an employee's belief that her employer has engaged in an unlawful employment practice . . . against existing substantive law." *Id.* at 1351. To establish a claim of sexual harassment, a plaintiff must show, *inter alia*,"that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002). In evaluating the objective component of the "severe or pervasive" prong, the Court examines whether the actions of the employer altered the employee's working conditions to such an extent that a reasonable person would find the atmosphere hostile and abusive. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 222-23 (1993). The objective component of this prong "is somewhat fact intensive." *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999) (*en banc*). In that regard, the United States District Court for the Southern District of Georgia has explained that adjudicating fact-specific sexual harassment cases often leaves federal courts in the unfortunate position of "decid[ing] what is 'sufficiently severe' by resorting to 'crudity comparables." That is, judges must compare the crudity and 'lewdity' found in one case with that deemed sufficient to survive a Rule 50 or 56 motion in another." *Breda v. Wolf Camera, Inc.*, 148 F. Supp. 2d 1371, 1376 (S.D. Ga. 2001).

Also, a plaintiff must show the harasser's conduct was based on her gender. *See Chavez v. New Mexico*, 397 F.3d 826, 833 (10th Cir. 2005) (noting that a plaintiff must not show only severe and pervasive conduct but that the conduct was based on the plaintiff's gender); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1331 (N.D. Ga. 2001) (holding that "a [plaintiff's racial] harassment claimant may [not] prevail without showing she was the victim of any [race]-based conduct"); *Spence v. Panasonic Copier Co., a Div. of Matsushita Elec. Corp. of Am.*, 46 F. Supp. 2d 1340, 1350 (N.D. Ga. 1999) ("General harassment which is not racial or sexual in nature is not actionable."). Therefore, where there is facially neutral conduct, it can only be considered as evidence of gender animus when the evidence is viewed in the context of other, overtly gender-based conduct. *Chavez*, 397 F.3d at 833 ("Conduct that appears gender-neutral in isolation may in fact be gender-based, but may appear so only when viewed in the context of other gender-based behavior.").

The Court concludes that Plaintiff failed to show that it was objectively reasonable for him to conclude that Smith's actions constituted sexual harassment. First, Plaintiff's argument that the EEOC determination of probable sexual harassment made it objectively reasonable for him to believe that sexual harassment existed is without merit. The objective reasonableness standard examines existing case law, not EEOC determinations. *See Clover*, 176 F.3d at 1351. At most, the EEOC determination provided Plaintiff with a subjective belief that sexual harassment occurred. *See id.* at 1352 n.2 (indicating that an employer's investigation into an EEOC complaint may provide a plaintiff with a subjective belief that he was opposing unlawful conduct but has no bearing on determining whether it was objectively reasonable to believe that the conduct was unlawful).

Second, Plaintiff has failed to identify of what conduct he was actually aware. Although the Court understands that Plaintiff's

investigation included a number of interviews relating to Smith and Tallman's interactions, it is not the Court's duty to review these documents to identify the conduct of which Plaintiff was aware that contributed to his belief that sexual harassment existed. *Cf. Gallimore-Wright v. Long Island R.R. Co.*, 354 F. Supp. 2d 478, 488 (S.D. N.Y. 2005) ("'Courts are entitled to assistance from counsel, and an invitation to search without guidance is no more useful than a litigant's request to a district court at the summary judgment stage to paw through the assembled discovery material. Judges are not like pigs, hunting for truffles buried in the record.'") (quoting *Albrechtsen v. Bd. of Regents of the Univ. of Wis. Sys.*, 309 F.3d 433, 436 (7th Cir. 2002).

Third, along with Plaintiff's failure to identify what conduct he perceived as being sexual harassment toward Tallman, Plaintiff has failed to argue that his belief was objectively reasonable under existing substantive law because he merely points to the EEOC determination and the fact that he submitted an extensive investigation showing harassment. [*See* Doc. 50 at 21]. "It is not for the [C]ourt to manufacture arguments on Plaintiff's behalf." *Bowden ex rel. Bowden v. Wal-Mart Stores, Inc.*, 124 F. Supp. 2d 1228, 1236 (M.D. Ala. 2000); *see also Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) (placing the burden on the parties to adduce arguments because "[t]here is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment"); *Pinto v. Universidad De Puerto Rico*, 895 F.2d 18, 19 (1st Cir. 1990) ("[T]he court is under no duty to exercise imagination and conjure what a plaintiff might have alleged, but did not, and do counsel's work for him or her."). Thus, Plaintiff's failure to proffer arguments as to what evidence permitted him to reasonably believe Smith's conduct was sexual harassment prevents him from establishing that he had a reasonable, objective belief that Smith's conduct constituted sexual harassment. On this basis alone, the Court could grant summary judgment.

However, the Court will also examine whether evidence establishes an objective reasonable belief that sexual harassment occurred. The Court has identified the following as incidents of which Plaintiff was aware that could be construed as sexual harassment: (1) around November 14, 2003, Smith stood too close to Tallman during her attempt to qualify for firearms, (Tallman Complaint dated 11/14/03 in Investigative Report at TC-0010); (2) around September 13, 2002, Smith told Tallman she was useless, doing nothing, and she was hired to fend off a lawsuit, (Tallman Complaint dated 9/13/02 in Investigative Report at TC-0013; Tallman Interview in Investigative Report at TC-0024); (3) other FPD employees reported that Smith made the following comments about Tallman: "worthless," "useless," "wasted uniform," "don't understand why they hired her," "doesn't do shit," and "a waste of taxpayer money," (Crawford Decl. in Doc. 50, Exh. 9 ¶ 16); and (4) Smith would normally position himself behind Tallman, (Tallman Interview in Investigative Report at TC-0028).

The Court finds that it was not objectively reasonable for Plaintiff to believe that Tallman experienced sexual harassment for one of two reasons. First, the evidence of Smith calling Tallman names and standing too close behind her does not approximate or appear similar to conduct that courts have determined to be sexual harassment where standing too close was one element of the harassment. *See Johnson v. Booker T. Washington Broadcasting Serv., Inc.*, 234 F.3d 501, 509 (11th Cir. 2000) (indicating that harasser's behavior was severe where he gave plaintiff unwanted massages, stood so close to plaintiff that his body parts touched her from behind, and pulled his pants tight to reveal the imprint of his private parts); *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 571 (2d Cir. 2000) (holding that plaintiff established a sexual harassment claim where harasser made remarks that women should be barefoot and pregnant and stood so close to plaintiff that she was backed against a wall and then looked at the plaintiff up and down in an uncomfortable way); *Gregory v. Daly*, 243 F.3d 687, 692-93 (2d Cir. 2001) (indicating that the following evidence would establish a

sexual harassment claim: (1) demeaning comments about women, (2) sexually demeaning statements, (3) initiating unwelcome physical conduct of a sexual nature, and (4) standing uncomfortably close to plaintiff despite her requests to move away).

Second, Smith's name calling used predominantly gender-neutral terms, and the only evidence of gender-based conduct - - Smith's habit of standing closely behind Tallman - - is insufficient for Smith's actions to be construed as gender-related. *See Chavez*, 397 F.3d at 833; *Hudson*, 209 F. Supp. 2d at 1331; *Spence*, 46 F. Supp. 2d at 1350. Therefore, the Court concludes that the evidence of which Plaintiff was aware does not even come close to establishing a sexual harassment claim.

b. Protected Activity -- Participation Clause

Defendant contends that Plaintiff cannot establish that his investigation constituted protected activity under the participation clause because: (1) Plaintiff's January 2004 investigation and report were an internal investigation and not part of Defendant's February 2003 response to the 2002 EEOC charge in which Plaintiff played no role; (2) Plaintiff's focus was only upon whether Smith's conduct violated FPD and Fairburn policies; (3) Fairburn was unaware that Plaintiff's investigatory evidence would be considered by the EEOC; and (4) a finding that Plaintiff participated in protected activity would render an employer liable whenever an investigator was fired for misconduct in connection to an investigation. [Doc. 27 at 17-18; Doc. 72 at 14-19].

Protected activity under the participation clause encompasses "proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC; it does not include participating in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC." *Total Sys. Servs., Inc.*, 221 F.3d at 1174. However, an employer's internal investigation in response to an employee's filing of an EEOC charge

of discrimination constitutes participation "in any manner" because the evidence gathered by the employer's investigation will be considered by the EEOC as part of its investigation. *Clover*, 176 F.3d at 1353. As a result, "an employee who participates in the employer's process of gathering ... information [as part of its investigation in response to a charge of discrimination] is participating, in some manner, in the EEOC's investigation." *Id.*

The Court concludes that Plaintiff engaged in protected activity. First, Plaintiff's investigation occurred after Tallman's December 2002 EEOC charge. Second, Plaintiff's investigation was in part a response to the 2002 EEOC charge. Plaintiff testified that he intended his investigation to encompass allegations in the 2002 EEOC charge because Plaintiff determined that Fairburn had not resolved Tallman's 2002 complaint, upon which the 2002 EEOC charge was based. (Crawford Dep. at 296-97). Thus, Plaintiff's investigation was in part a response to the 2002 EEOC charge, as Plaintiff attempted to determine whether sexual harassment occurred. *See Clover*, 176 F.3d at 1353 (indicating that participation in an internal investigation responding to an EEOC charge is a form of participation).

Third, Defendant deemed Plaintiff's investigation to be related to Tallman's EEOC charge. Williams recognized that Plaintiff's complaint extended back to events that occurred under the prior FPD chief, because he took issue with the investigation's scope. (Williams Dep. at 252-53). Also, Williams commented that Plaintiff's report would "open up a can of worms" and result in Fairburn getting sued. (Crawford Decl. ¶¶ 20-21 in Doc. 50 at Exh. 9). Further, Defendant requested that conciliation stemming from the EEOC's determination that Tallman more likely than not experienced sexual harassment be delayed until after Plaintiff completed his investigation. [Doc. 50 at Exh. 27].[16] Although the

---

[16] Defendant objects to the Court's consideration of this letter because the document was not authenticated and merely attached to Plaintiff's response to

EEOC may have completed its investigation into Plaintiff's 2002 charge before Plaintiff completed his own investigation, EEOC proceedings were still in progress as Fairburn and Tallman still had to try to resolve Tallman's 2002 EEOC charge through conciliation. *See* 29 C.F.R. § 1601.24 (indicating that conciliation is used where the EEOC determines that there is a reasonable cause to believe that an unlawful employment practice occurred to try to eliminate the practice). Once Plaintiff's investigation was complete, Defendant's attorney informed the EEOC that Fairburn's investigation found no violation of Title VII by Smith. (Letter dated 3/1/04 in Doc. 50 at Exh. 28). This letter also indicates that Defendant deemed the investigation to be related to Tallman's EEOC charge. Thus, Plaintiff's investigation into events was related to the 2002 EEOC charge, investigation, and proceedings. As a result of the foregoing factors, Plaintiff's investigation constitutes protected activity under the participation clause either because it was related to the EEOC investigation of the 2002 charge or it was related to EEOC proceedings relating to the 2002 charge. *See* 42 U.S.C. § 2000e-3(a).

The Court disagrees with Defendant's reading of *Clover* that Plaintiff must show both that (1) his investigation was in response to the 2002 EEOC charge, and (2) Defendant was actually aware that the evidence gathered in the investigation would be considered by the EEOC. The relevant language in *Clover* is as follows:

> Here, we recognize that, at least where an employer conducts its investigation in response to a

---

summary judgment. [Doc. 72 at 17 n.14]. The Court rejects Defendant's argument. At the summary judgment stage, a plaintiff does not have to produce admissible evidence, only evidence that can be reduced to an admissible form at trial. *See Denney v. City of Albany*, 247 F.3d 1172, 1189 n.10 (11th Cir. 2001). The Court sees no reason why the letter could not be authenticated at trial, and Defendant does not claim that the document could not be authenticated at trial, but only that Plaintiff has not presently authenticated the letter. The letter therefore will be considered.

> notice of charge of discrimination, and is thus aware that the evidence gathered in that inquiry will be considered by the EEOC as part of its investigation, the employee's participation is participation "in any manner" in the EEOC investigation.

Clover, 176 F.3d at 1353. Prior to this quotation, the *Clover* Court noted that "an employer receiving a form notice of charge of discrimination *knows* that any evidence it gathers after that point and submits to the EEOC will be considered by the EEOC as part of the EEOC investigation." *Id.* (emphasis added). Thus, it appears that the *Clover* court deems an employer constructively aware that evidence gathered in an employer's investigation of an EEOC charge will be considered by the EEOC. There does not appear to be any requirement that Plaintiff show that the employer was actually aware that the evidence gathered would be considered by the EEOC. Instead, the mere fact that employer investigated the EEOC charge renders the employer aware that the evidence could be considered by the EEOC. The facts of *Clover* support this analysis because the opinion does not suggest that the employer actually knew that the EEOC would consider the evidence provided by the plaintiff. *See id.* at 1348-50, 1352-53.[17]

The Court also rejects Defendant's public policy argument. A finding that Plaintiff's conduct was protected activity does not automatically render any employer liable under Title VII whenever an employer disciplines or terminates an investigating employee for misconduct in investigating a Title VII charge. Although the terminated investigator may be able to establish a *prima facie* case under the participation clause, the terminated investigator will only

---

[17] Even if Defendant had to actually be aware that the EEOC would consider the evidence, the Court concludes that Plaintiff has demonstrated this actual knowledge. It is reasonable to assume that Defendant knew that the EEOC would consider the evidence because, as discussed above, Defendant's attorney requested that conciliation be delayed until completion of Plaintiff's investigation and then informed the EEOC of the conclusions in Plaintiff's complaint.

succeed on a retaliation claim if he ultimately establishes that the employer was motivated by retaliatory animus. *See Wallace*, 415 F.3d at 860.

Because Plaintiff has established that he engaged in protected activity under the participation clause, the Court turns to the issue of causation.

c. Causation

Defendant argues that Plaintiff cannot show a causal connection because: (1) the decision makers were not aware that Plaintiff's internal investigation constituted protected activity, as no one interpreted the investigation as finding any unlawful harassment and Plaintiff never described Smith's misconduct as sexual harassment; (2) William's reference to the inaccurate internal affairs investigation does not avoid the fact that it was not considered or discussed at the City Council meeting and the investigation supported the city in its apparent finding that there was no unlawful harassment; (3) the inference of temporal proximity was severed by intervening events; and (4) Plaintiff made no showing of retaliatory animus as the actual decisionmakers - - Mayor Hannah and the City Council - - did not consider Plaintiff's investigation in making the decision to terminate him and Williams was not a cat's paw. [Docs. 27 at 18-28, 72 at 19-27].

This Court "construe[s] the causal link element broadly so that 'a plaintiff merely has to prove that the protected activity and the. . . [adverse] action are not completely unrelated.'" *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004) (quoting *Olmsted v. Taco Bell Corp.*, 141 F.3d 1457, 1460 (11th Cir. 1998)). The causality element is satisfied when the plaintiff: (1) provides evidence that the decisionmaker had knowledge of the protected activity; and (2) shows "close temporal proximity" between the knowledge of the protected activity and the adverse employment action. *Higdon*, 393 F.3d at 1220 (citing *Shotz v. City of Plantation*

Fla., 344 F.3d 1161, 1180 n.3 (11th Cir. 2003)). Where a plaintiff fails to create an inference of causation through temporal proximity, a plaintiff can still show causation through other evidence. *See Higdon*, 393 F.3d at 1220 ("If there is a substantial delay between the protected expression and the adverse action in the absence of other evidence tending to show causation, the complaint of retaliation fails as a matter of law."); *Johnson v. Palma*, 931 F.2d 203, 207 (2d Cir. 1991) (indicating that plaintiff can establish evidence of causation "through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or directly through evidence of retaliatory animus directed against a plaintiff by the defendant") (citation and internal quotation marks omitted); *Addison v. Gwinnett County*, 917 F. Supp. 802, 812 (N.D. Ga. 1995) ("[T]he court may infer a causal connection in the absence of temporal proximity where there is substantial other evidence indicating such a connection.").

The Court concludes that Plaintiff has presented evidence to establish an inference of causation. First, construing the facts in a light most favorable to Plaintiff, he has shown that the decisionmakers were aware of his protected activity. Defendant's argument that the decisionmakers did not understand Plaintiff's investigation as being statutorily protected is unpersuasive. Defendant admits that Fairburn was aware of the investigation. [Doc. 27 at 19]. It then is reasonable to infer that Fairburn's decisionmakers knew that the investigation examined the events stemming from Tallman's 2002 EEOC complaint because Williams understood Plaintiff's investigation to encompass these past events, (Williams Dep. at 252-53), Williams informed Mayor Hannah that investigation uncovered no harassment, (Williams Decl. ¶ 8 in Doc. 27 at Exh.1; Hannah Decl. ¶ 5 in Doc. 32), and Williams briefed the City Council on problems in the FPD at the February 27 meeting, (Minutes from Special Meeting in Doc. 50 at Exh. 19). Following the meeting, Williams indicated that Plaintiff was being terminated in part for his inaccurate investigation. (D ¶ 95). This evidence, construed in a light most favorable to Plaintiff, allows for a

reasonable inference that the decisionmakers were aware that Plaintiff's investigation extended to the Smith's conduct that led to the EEOC complaint. Thus, by virtue of being aware of the investigation, it was aware of Plaintiff's protected activity.[18] This is all that the case law requires. It is irrelevant as to whether Fairburn would have interpreted Plaintiff's investigation as being adverse to its position because Defendant only needs to be aware of the protected activity. *See Higdon*, 393 F.3d at 1220.[19]

Second, Plaintiff can show temporal proximity in that he released his report on January 22, 2004, and was terminated nearly five weeks later following the February 27, 2004, City Council meeting. *See Higdon*, 393 F.3d at 1220-21 (determining that a one-

---

[18] This conclusion is consistent with the Court's determination that the decisionmakers did not know Plaintiff's behavior constituted opposition under the opposition clause. Under the participation clause, the employer only needs to know about the protected activity, not that the plaintiff opposed conduct or that or uncovered any harassment. *See Total Sys. Servs., Inc.*, 221 F.3d at 1174 (indicating that the participation clause protects proceedings and activities that occur in conjunction with or after the filing of a formal EEOC charge). Only in the opposition clause context does the employer need to know that the plaintiff opposed unlawful conduct. *See, e.g., Reynolds*, 106 F. Supp. 2d at 1253-54.

[19] Defendant cites three cases in support of its proposition, none of which are persuasive or controlling. First, *McShane v. U.S. Attorney General*, 144 Fed.Appx. 779, 791 (11th Cir. 2005), determined that there was no causal connection because the decisionmaker was not informed of the contents of the complaint or where it was filed. Here, the evidence, as discussed above, indicates that the decisionmakers knew that Plaintiff's investigation constituted protected activity. Second, in *Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997, 1008 (7th Cir. 2000), the Seventh Circuit determined that the plaintiff could not establish a *prima facie* case of retaliation because the employer was unaware of the protected activity as the plaintiff failed to complain about pregnancy discrimination. Again, the evidence, in a light most favorable to Plaintiff, indicates that the decisionmaker's knew that Plaintiff's investigation was protected activity under the participation clause. Third, the Court concludes that *Gold v. Gallaudet College*, 630 F. Supp. 1167, 1187 (D. D.C. 1986), is not relevant because the *Gold* Court examined when conduct could be construed as protected activity and did not appear to examine causation.

month gap between the protected activity and the adverse action can establish causality, but a "substantial delay," such as three months between the protected activity and the adverse action, in the absence of other evidence of causation cannot establish causation); *see also Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001) (citing circuit court decisions indicating that a three to four month gap is insufficient to establish a causal connection in a retaliation case).

Defendant also claims that intervening events break the inference of causation from temporal proximity. The Court rejects this argument, because Plaintiff has presented evidence that Plaintiff's investigation was in part a reason for his termination, in that Williams told Chief Brown that Fairburn terminated Plaintiff for his inaccurate investigation. (D ¶ 95). Certainly, this evidence that Plaintiff's investigation played a role in his termination provides Plaintiff with some evidence of causation such that Defendant cannot claim intervening events broke an inference of causation.

Defendant's assertion that Williams's statement regarding the inaccurate internal investigation should not be considered a reason for Plaintiff's termination is unpersuasive. The Court must construe the evidence in a light most favorable to Plaintiff. *See Wilson*, 376 F.3d at 1085. Although Mayor Hannah and the City Council made the final decision to terminate Plaintiff, Williams was present at the council meeting. Therefore, Williams's explanation that Plaintiff's termination was in part due to his inaccurate investigation reasonably can be viewed as his summary of the reasons that the decisionmakers used for terminating Plaintiff. Although Mayor Hannah denied that this was a reason and the meeting minutes failed to record Plaintiff's investigation as a reason for Plaintiff's termination, this evidence merely contradicts Williams's statement; this evidence cannot defeat Williams's statement at summary judgment. Thus, an issue of material fact exists as to whether the inaccurate investigation played a role in the termination.

Finally, the Court rejects Defendant's attempt to defeat the causation element by claiming that Plaintiff did not show a retaliatory animus. The temporal proximity between Plaintiff's report, the decisionmakers' knowledge of Plaintiff's participation, and Williams's statement that Plaintiff was terminated for the internal affairs investigation is sufficient "to prove that the protected activity and the . . . [adverse] action are not completely unrelated." *Higdon*, 393 F.3d at 1220 (citation omitted). Plaintiff need not produce any other evidence of retaliatory animus at the *prima facie* stage. However, Plaintiff will ultimately need to prove that Defendant was motivated by retaliatory animus.

2. Pretext

Plaintiff contends that Defendant's four legitimate, nondiscriminatory reasons for terminating Plaintiff - - FPD officers patrolled and made traffic stops on I-85, FPD officers complained about not being properly compensated, dispatcher problems, and complaints of low morale or favoritism with the FPD - - are pretext for discrimination.[20] [Doc. 50 at 35-43]. Plaintiff first contends that Williams's statement to Chief Brown that Plaintiff was terminated because of an inaccurate internal affairs investigation along with the *prima facie* case is sufficient evidence of pretext and shows evidence of discriminatory animus. [*Id.* at 35-36]. Plaintiff then suggests reasons why each individual reason was pretext for discrimination. [*Id.* at 36-43].

To show pretext, a plaintiff may "either prov[e] that intentional [retaliation] motivated the employer or produc[e] sufficient evidence to allow a rational trier of fact to disbelieve the

---

[20] The Court notes that Defendant failed to explicitly state its legitimate, nondiscriminatory reasons for firing Plaintiff in its motion for summary judgment or reply brief. [*See* Docs. 27, 72]. However, Plaintiff indicated that Defendant's four intervening events were in fact Defendant's legitimate, nondiscriminatory reasons for firing Plaintiff without objection from Defendant. [*See* Docs. 50 at 26-27, 36-43, 72 at 29-31].

legitimate reason proffered by the employer, which permits, but does not compel, the trier of fact to find illegal [retaliation]." *See Wilson*, 376 F.3d at 1088. When a plaintiff chooses to show pretext by rebutting the reasons for the defendant's employment action, the plaintiff must rebut all of Defendant's reasons to establish pretext. *See Chapman v. AI Transport*, 229 F.3d 1012, 1037 (11th Cir. 2000) (*en banc*) ("[T]o avoid summary judgment, a plaintiff must produce sufficient evidence for a reasonable factfinder to conclude that each of the employer's proffered nondiscriminatory reasons is pretextual"); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1539-43 (11th Cir. 1997) (requiring employee to rebut "all of the defendant's proffered nondiscriminatory reasons for its actions" to avoid judgment as a matter of law).

a. Williams's Statement about an Inaccurate Internal Affairs Investigation

Plaintiff contends that Williams's statement that Plaintiff was terminated because of the inaccurate investigation along with his *prima facie* case establishes retaliatory motive. [Doc. 50 at 35-36]. Defendant counters that any accuracy issues that Fairburn had with Plaintiff's investigation have no bearing on the issue of pretext because the decisionmakers believed that Plaintiff found no basis for sexual harassment and, therefore, his report was unrelated to any protected conduct by Plaintiff. [Doc. 72 at 31].

A statement that is not direct evidence "may provide circumstantial evidence to support an inference of [retaliation]." *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1291 (11th Cir. 1998).[21] The Court then looks to "whether such circumstantial evidence, along with other evidence (including [plaintiff's] *prima facie* case), might lead a reasonable jury to disbelieve [the employer's] proffered reason for firing [the plaintiff]." *Id.* at 1292.

---

[21] Plaintiff has never alleged that Williams's statement to Brown constituted direct evidence, so the Court will not address this issue.

Evidence of the statements by themselves however are not sufficient to establish a case of pretext. Instead, a plaintiff must produce other evidence of pretext before such statements can constitute pretext. *See Rojas v. Florida*, 285 F.3d 1339, 1343 (11th Cir. 2002) (holding that where there was no additional evidence of pretext, a statement suggesting discriminatory intent cannot by itself establish pretext); *see also Scott v. Suncoast Beverage Sales, Ltd.*, 295 F.3d 1223, 1230 (11th Cir. 2002) (holding that where "there is no additional evidence that is even marginally persuasive on the issue of pretext," a statement indicating discriminatory intent cannot establish pretext).

The Court concludes that Williams's statement provides circumstantial evidence of retaliation. In a light most favorable to Plaintiff, Williams's statement indicates that at least one motive for firing Plaintiff was his inaccurate investigation because it is reasonable to assume that Williams was reporting the rationale given by the city council and Mayor Hannah at the February 27 meeting in which Williams attended and participated. (*See* Minutes from Special Meeting in Doc. 50 at Exh. 19). Although it is not clear what Williams meant by an "inaccurate" investigation, the Court can reasonably infer, in the absence of any evidence regarding the meaning of this statement, that this criticism was a result of the fact that Plaintiff investigated events surrounding the 2002 EEOC complaint. Williams even stated that one of his concerns with Plaintiff's investigation was Plaintiff's decision to delve into events of 2002. (Williams Dep. at 252-53). Further, Williams indicated that Plaintiff's investigation would open a can of worms and subject the city to a lawsuit. (Crawford Decl. ¶¶ 20-21 in Doc. 50 at Exh. 9). As a result, Defendant's argument that the inaccuracies must have dealt with some non-protected aspect of the investigation is not persuasive. However, Williams's statement alone is insufficient to establish pretext. *See Rojas*, 285 F.3d at 1343. Therefore, the Court turns to Plaintiff's attempts to rebut Defendant's legitimate reasons.

b. I-85 Issue

Plaintiff contends that the I-85 issue was pretext because: (1) Williams obtained information from Smith in secret about I-85 stops; (2) Plaintiff never received any criticisms prior to the protected activity; (3) Plaintiff received an excellent performance review and subsequent raise; (4) the issue related to other officers' conduct, not Plaintiff's; (5) Fairburn never provided Plaintiff with an opportunity to respond; (6) the City Council did not receive documents from witnesses or hear witnesses regarding the issue; (7) there was no prior discussion of FPD problems at City Council meetings; and (8) Williams indicated that Plaintiff's termination was in part a result of his inaccurate internal affairs investigation.[22] [Doc. 50 at 37-38].

i. Information from Smith

The Court concludes that Williams's decision to seek information about I-85 traffic stops from Smith provides no basis for concluding the I-85 issue was pretext. Contrary to Plaintiff's contention, Williams's action does not amount to surveillance. Williams initially tried to obtain the information from Chief Brown, but after Chief Brown failed to provide the information in a timely fashion, he asked Smith. (Williams Decl. ¶¶ 11-12 in Doc. 27 at Exh. 1). Williams's decision does not reflect any improper motive, and to the extent that Plaintiff contends that it does, he has failed to provide any evidence of such unsavory motive. Without such evidence, the Court cannot take an unreasonable inferential step and conclude that Williams directed Smith to engage in surveillance. *See Hilburn v. Murata Elec. North Am., Inc.*, 181 F.3d 1220, 1228 (11th Cir. 1999) ("'[C]onclusory allegations without specific supporting facts have no probative value.'") (quoting *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir.1985).

---

22 Because the Court addresses Williams's statement above, it will not repeat its discussion.

ii. Failure to Criticize/Warn

"In discharge cases, failure to warn an employee of poor performance when poor performance is the articulated reason may indicate pretext." *Stone v. Galaxy Carpet Mills, Inc.*, 841 F. Supp. 1181, 1188 (N.D. Ga. 1993); *see also Flores v. Buy Buy Baby, Inc.*, 118 F. Supp. 2d 425, 431 (S.D. N.Y. 2000) (suggesting that failure to warn along with evidence of employer departing from its prior practice is evidence of pretext); *Evans v. Meadow Steel Prods., Inc.*, 579 F. Supp. 1391, 1395 n.6 (N.D. Ga. 1984) ("The failure to warn and thereby given an opportunity for improvement has been considered evidence of pretext."). *But see Rose v. Panolam Industries Intern. Inc.*, 301 F. Supp. 2d 239, 244-45 (D. Conn. 2004) ("[A] mere lack of notice of performance deficiencies is insufficient to defeat summary judgment on a discrimination claim.").

The Court concludes that Plaintiff cannot show pretext for failure to warn. Although Plaintiff contends that he was never notified about the problems with the I-85 issue, the evidence suggests otherwise. It is undisputed that City Hall's policy was not to patrol I-85, and Plaintiff knew of this policy. (Hannah Decl. ¶ 6 in Doc. 32; Crawford Dep. at 181). Chief Brown even told Plaintiff not to allow patrols of I-85. (D ¶ 27). Plaintiff was therefore aware of and warned about FPD patrols on I-85. As a result, he cannot legitimately contend that he was unaware or not warned about I-85 as an issue.

iii. Performance Evaluation

"Pretext is not [merely] established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations." *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 528 (3d Cir. 1992); *see also Dingman v. Delta Health Group, Inc.*, 26 F. Supp. 2d 1349, 1353 (S.D. Fla. 1998) (holding that prior positive reviews are not indicative of pretext where intervening events occur).

Therefore, a change in management's evaluations of an employee is not by itself evidence of pretext because an employer is entitled to change its opinion of an employee. *Tungol v. Certainteed Corp.*, 202 F. Supp. 2d 1189, 1200 (D. Kan. 2002). However, a plaintiff may establish pretext where he had consistently received positive evaluations in the past until the time he filed a complaint when he began receiving critical evaluations. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 921 (11th Cir. 1993); *see also Walker v. NationsBank of Florida N.A.*, 53 F.3d 1548, 1564 n.7 (11th Cir. 1995) ("[W]here the employee's poor performance is proffered as the basis for dismissal, an employer's contemporaneous reports of satisfactory performance will permit the factfinder to infer" pretext.).

The Court concludes that Plaintiff's one previous positive evaluation fails to establish that the I-85 issue (or any of the other reasons identified by Defendant) are unworthy of credence. Plaintiff's performance evaluation occurred in September 2003, nearly five months before his termination. It is clear that events after September triggered a change in Fairburn's assessment of Plaintiff, including the fact that officers whom he supervised were involved in patrol stops on or near I-85, despite Fairburn's policy against such stops. (D ¶ 16; Hannah Decl. ¶ 6 in Doc. 32; Williams Decl. at Exh. B in Doc 27 at Exh. 1). Also, the Court notes that Plaintiff did not have a history of positive evaluations at Fairburn as the September 2003 evaluation is the only one that he identifies, so this one evaluation cannot be pretext. *Cf. Hairston*, 9 F.3d at 921.

Further, the Court observes that Chief Brown evaluated Plaintiff in September 2003 while the City Council and the Mayor effectively evaluated Plaintiff in 2004 when they decided to discharge him. In other words, different individuals examined Plaintiff's performance, which also prevents the Court from finding that Chief Brown's positive September evaluation is evidence of pretext. *See Rojas*, 285 F.3d at 1343 ("Different supervisors may impose different standards of behavior, and a new supervisor may decide to enforce policies that a previous supervisor did not consider

important."). Accordingly, the Court concludes that Plaintiff's September 2003 job evaluation is not evidence of pretext.

iv. Criticism Concerned FPD Officers, not Plaintiff

Plaintiff's contention that the I-85 issue concerned other officers instead of him lacks merit. It is clear that Plaintiff was responsible for the actions of the patrol units. (D ¶ 16). Also, the evidence indicates that there were multiple instances in which FPD officers made stops on I-85 or on the ramp to I-85. (Williams Decl. at Exh. B). The Court agrees with Defendant that it is reasonable for an employer to hold a supervisor responsible for his subordinate's actions. Thus, Defendant's decision to hold Plaintiff accountable is not evidence of pretext.

v. Opportunity to Respond

The Court concludes that Defendant's failure to allow Plaintiff to respond to the criticisms and allegations of him is not pretext for retaliation. First, Plaintiff has not pointed to any case law indicating that an employer's decision to deny an employee with the opportunity to respond is evidence of pretext. The only case that the Court found on the issue suggests that an employer's failure to allow a terminated employee to respond is not evidence of pretext. *See Crowe v. Sch. Dist. of Webster*, 300 F. Supp. 2d 787, 803 (W.D. Wis. 2003) (rejecting plaintiff's argument that the employer's failure to allow him to respond to his termination was pretext because "[s]imply showing that there might be another view of the evidence does not prove that defendants' reasons for terminating [him] were pretextual").

Second, Plaintiff has failed to provide any evidence that Defendant had a policy of permitting terminated employees to respond to their terminations or that Defendant allowed other employees to respond to their terminations. *Cf. Williams v. City of Valdosta*, 689 F.2d 964, 975 (11th Cir. 1982) ("It is undisputed,

however, that the City's adherence to its formal promotional policy was inconsistent and arbitrary at best. This inconsistency supports the conclusion that resort to the examination requirement was a pretext for singling out [plaintiff] for unfavorable treatment."). Thus, he cannot show that Defendant failed to follow its normal policies or that it treated other employees differently. Third, Plaintiff has not presented any evidence that he even tried to have Fairburn reconsider his termination. Finally, to the extent that Plaintiff claims that Fairburn had to allow Plaintiff to respond before terminating him, the Court rejects this claim because it asks the Court to alter Fairburn's personnel policies. *See Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) ("Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions. . . ."). For these reasons, the Court concludes that Fairburn's failure to allow Plaintiff to respond is not evidence of pretext.

vi. Defendant's Investigation

Plaintiff's argument that Defendant should have heard witnesses before terminating him is essentially an argument that Defendant's decision-making process was flawed or that its investigation into Plaintiff's alleged performance deficiencies was improper. This challenge to Defendant's investigation is misplaced. *See Ghosh v. Ind. Dept. of Envtl. Mgmt.*, 192 F.3d 1087, 1090 (7th Cir. 1999) ("Criticism of an employer's evaluation process, even if well-founded, is not enough to establish pretext."); *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997) ("[A]n opportunity for rebuttal is not an invitation to criticize the employer's evaluation process . . . ."); *Crowe*, 300 F. Supp. 2d at 803 ("[Plaintiff's] beliefs about the adequacy of the investigation . . . [is] of no consequence."); *Hugley v. Art Institute of Chicago*, 3 F. Supp. 2d 900, 908 (N.D. Ill. 1998) (indicating that the adequacy of the employer's investigation is not the appropriate inquiry).

Also, Plaintiff has not demonstrated that Fairburn's failure to

call witnesses shows that the I-85 issue was pretext. (Williams Decl. at Exh. B). Evidence clearly shows that the FPD issued tickets and made stops on or around I-85. It is unclear how interviewing witnesses would change the tenor of the fact that tickets and stops were made on or around I-85. *See Cellini v. Harcourt Brace & Co.*, 51 F. Supp. 2d 1028, 1040 (S.D. Cal. 1999) ("Plaintiff has not produced evidence indicating, for example, that the three witnesses that [the employer] failed to interview would have stated that plaintiff had not participated in the unprofessional conduct of which he was accused."). The issuance of tickets and record of traffic stops shows that Plaintiff's subordinates were working on I-85 despite Fairburn's policy, obviating the need for Defendant to call witnesses.

vii. Lack of Prior Discussion of the FPD

The Court concludes that Fairburn's failure to discuss problems with the FPD at other city council meetings is not evidence of pretext. First, the City Council, Mayor Hannah, and Williams appear to have become aware of problems in the FPD toward the end of December 2003 and early 2004. For instance, Williams did not receive information concerning the extent of the FPD's patrol around I-85 until February 25, 2004, which was between the last council meeting and the special meeting. (Williams Decl. ¶ 13 in Doc. 27 at Exh. 1) Although Fairburn decisionmakers could have discussed certain FPD issues at the Council meeting that occurred four days before the special council meeting, the fact that Fairburn failed to discuss any FPD issues does not suggest that the I-85 issue or any of the other issues were pretext for retaliation. Instead, it only shows that the scheduling of a special meeting to consider FPD problems indicates that Fairburn deemed the FPD problems to be serious enough to warrant a special meeting.

c. Wage Issue

Plaintiff contends that the wage issue was pretext because: (1) there is no support for this reason as no one discussed the issue

with Plaintiff; (2) Plaintiff did not receive prior criticisms; (3) no one investigated Detective Brown's assertion of wage issues; and (4) Detective Brown was a close friend of Smith's, which required an investigation.[23]

I. No Support for the Wage Issue

The Court concludes that Fairburn presented supporting evidence for a wage problem because Williams testified that he received complaints about officers not being paid overtime. (*See* Williams Dep. at 130-31, 135-37, 139-41). To the extent that Plaintiff contends that there is no support for the wage issue because no one ever discussed it with him, this argument is addressed below in the failure to criticize heading.

ii. Failure to Criticize Regarding the Wage Issue

The Court concludes that Defendant's failure to criticize Plaintiff regarding the wage issue provides some evidence of pretext. "In discharge cases, failure to warn an employee of poor performance when poor performance is the articulated reason may indicate pretext." *Stone*, 841 F. Supp. at 1188. The evidence shows that Defendant did not inform Plaintiff or Chief Brown of problems regarding wages. (*See* Crawford Decl. ¶¶ 31, 40 in Doc. 50 at Exh. 9). Williams indicated that he had little contact with Plaintiff and instead addressed concerns to Chief Brown. (Williams Dep. at 110-11). Brown indicated that he never received any criticism with overtime, as the issue only arose with regard to the budget. (Brown Dep. at 149). The only evidence of any criticism came during Williams's February lunch with Chief Brown in which Williams

---

[23] In relation to the wage issue, Plaintiff also argued the following as evidence of pretext: (1) Plaintiff received a positive evaluation; (2) Plaintiff was never provided an opportunity to respond; (3) the City Council did not discuss FPD problems in prior council meetings; and (4) Williams indicated that Plaintiff's termination was in part a result of his inaccurate internal affairs investigation. The Court previously discussed these arguments, so it will not address them again.

criticized Plaintiff's performance generally. (Brown Dep. at 52-53). Without any specific evidence relating to criticism of Plaintiff's handling of wage issues, Plaintiff has suggested that Defendant's wage issue might be evidence of pretext.[24]

iii. Failure to Investigate Detective Brown's Allegations

The Court concludes that Defendant's failure to investigate Detective Brown's allegations is not evidence of pretext. Courts do not examine whether an employee committed the misconduct of which he was charged but whether the employer had a good faith belief that the employee had engaged in wrongdoing. *See Elrod*, 939 F.2d at 1470. Although an investigation into Detective Brown's allegations that he was not paid overtime might have revealed that Plaintiff appropriately permitted overtime to be paid, Plaintiff has failed to demonstrate why Defendant was required to conduct an investigation or why Defendant is not permitted to believe Detective Brown. Also, Officer Cowart's allegations that he too was not being paid overtime shows that Fairburn had a good faith belief that there was a wage issue. (*See* Williams Dep. at 127-28, 130-31, 135-38, 139-41, 180-83). Therefore, Plaintiff has failed to show that Defendant could not have held an honest belief that a wage issue existed.

iv. Detective Brown's Relationship with Smith

The Court concludes that Detective Brown's relationship with Smith is irrelevant to showing that the wage issue is pretext. First, Plaintiff has failed to present any evidence that Detective Brown's friendship with Smith led Detective Brown to falsely report a wage problem. Evidence of friendship alone is insufficient. Thus,

---

[24] To the extent that Defendant would argue that Plaintiff was aware of the wage issue because the December 2002 assessment reported overtime concerns and Fairburn settled with the Department of Labor regarding overtime in the FPD, these problems involved the prior FPD leadership, not Plaintiff's leadership.

Plaintiff has merely presented a conclusory allegation, which this Court does not consider on summary judgment. *See* FED.R.CIV.P. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial."); *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000)("[C]onclusory allegations without specific supporting facts have no probative value.") (citation omitted). Second, even if Detective Brown's friendship with Smith somehow establishes that Detective Brown lied about a wage issue, Plaintiff has not provided any evidence that Fairburn should not have reasonably believed Detective Brown. *See Total Sys. Servs., Inc.*, 221 F.3d 1177-78 (indicating that plaintiff cannot show pretext by arguing an employee lied where employer had a good faith belief to believe the employee). Therefore, the relationship between Detective Brown and Smith does not show that the wage issue was pretext.

The Court concludes that Defendant's failure to warn Plaintiff about concerns with wage problems during his tenure as Major suggests that the wage issue reason is pretext for retaliation. Therefore, Plaintiff has created an issue of material fact as to whether Defendant's true reason regarding the wage issue was pretext.

d. Dispatcher Issue

Plaintiff contends that the dispatcher threat issue was pretext because: (1) dispatcher deposition testimony indicated that only one dispatcher, Norman, threatened to resign, not a number of dispatchers; (2) Plaintiff was not previously criticized regarding dispatcher problems; and (3) Norman was considered unreliable by all other dispatchers. [Doc. 50 at 40-41].[25] Defendant responds that

---

[25] Plaintiff also offers the following reasons for pretext: (1) Plaintiff received a positive job evaluation; (2) Plaintiff never had an opportunity to respond to this issue; (3) City Council had not previously discussed FPD problems; and (4) Williams's statement. [Doc. 50 at 40-41]. Because the Court has previously

the dispatcher issue was not pretext because: (1) Plaintiff was aware that his decision to terminate Norman was a mistake because Fairburn reinstated her following her protest; and (2) evidence showed that there was dispatcher discontent. [Doc. 72 at 30].

i. Dispatcher Deposition Testimony

The Court concludes that the dispatcher deposition testimony indicating that only one dispatcher threatened to resign is not evidence of pretext. Even if a number of dispatchers indicated that they were not aware of other dispatchers threatening to resign,[26] it is undisputed that Norman told Faulkner that she was going to resign. (Norman Dep. at 48-49). Whitlock also informed Williams that Wallace would leave if the dispatchers went to a 12-hour shift or if Wallace's supervision responsibilities were removed. (Whitlock Dep. at 66-67). Therefore, Fairburn's managers were aware that dispatchers were considering leaving.

Also, evidence shows that all dispatchers were unhappy even if it did not lead them to threaten to turn in their resignation. Dispatchers complained of the following: the promotion of Peggy Wallace to supervisor, the under-staffing of the department, Wallace's evaluations, the conditions of the dispatcher room, the performance of other dispatchers, and scheduling. (Whitlock Dep. at 33-34; Baker Dep. at 16-18; Faillo Dep. at 20-21). Williams and Faulkner were clearly aware of these problems as Norman complained to Faulkner about the dispatcher position, (Norman Dep. at 53), Faillo mentioned his displeasure about Wallace's promotion to Faulkner, (Faillo Dep. at 36-37), and Whitlock spoke with

---

addressed these arguments, it will not repeat its analysis.

[26] The deposed dispatchers indicated that they were unaware of any dispatchers threatening to resign although Whitlock indicated that she would leave if Fairburn implemented a 12-hour schedule. (Faillo Dep. at 40; Baker Dep. at 45-46; Whitlock Dep. at 37-38; Norman Dep. at 84-85). The Court notes that Plaintiff did not depose all dispatchers who worked during Crawford's employment, as Peggy Wallace and Bobbie Smith were not deposed.

Williams about dispatcher discontent. (Whitlock Dep. at 42-48). This evidence clearly shows that a number of dispatchers were discontent in Fairburn.

ii. Prior Criticism Regarding Dispatcher Discontent

The Court concludes that Defendant's failure to warn Plaintiff about its concern regarding dispatcher morale is not evidence of pretext, based on the overwhelming evidence that dispatchers were unhappy and Plaintiff knew about problems with Norman. The Court recognizes that a failure to warn a Plaintiff of performance deficiencies may establish pretext. *See Stone*, 841 F. Supp. at 1188; *Evans*, 579 F. Supp. at 1395 n.6. However, the evidence, as discussed above, clearly shows that dispatchers were unhappy with their conditions and that Fairburn management knew of this discontent. Also, at the same time that Williams stated that Plaintiff was fired for the inaccurate investigation, Williams also indicated that Plaintiff was fired because of dispatcher Norman. (D ¶ 95). Plaintiff was clearly aware that his termination of Norman caused a problem because Fairburn rehired her immediately. (*See* D ¶ 68). Even with Williams's statement about an inaccurate investigation, the overwhelming evidence of dispatcher discontent and Fairburn's reversal of Norman's termination shows that the dispatcher issue was a legitimate reason.

iii. Dispatchers' Opinions of Norman

The Court concludes that the dispatchers' opinions of Norman are irrelevant to showing pretext. As discussed above, the evidence clearly shows that all dispatchers, not just Norman, were unhappy, and the Court is uncertain as to how the reliability of Norman changes this evidence. If Plaintiff intends to argue that he correctly terminated Norman because of her unreliability, this argument fails because Plaintiff has failed to offer evidence that Fairburn's decisionmakers or managers knew of Norman's unreliability. Although other dispatchers may have viewed Norman

as unreliable, the Court is aware of only three conversations between dispatchers and Williams or Faulkner, none of which raised Norman's reliability. (*See* Faillo Dep. at 36-37; Norman Dep. at 53; Whitlock Dep. at 42-48). Without such evidence, Plaintiff has failed to show that Fairburn's decisionmakers could not honestly believe that Norman was reliable. As a result, the Court concludes that the dispatcher's opinions of Norman does not demonstrate pretext. *See Ballance v. City of Springfield*, 424 F.3d 614, 617 (7th Cir. 2005) ("Pretext requires more than showing that the decision was 'mistaken, ill considered or foolish, [and] so long as [the employer] honestly believes those reasons, pretext has not been shown.'") (quoting *Jordan v. Summers*, 205 F.3d 337, 343 (7th Cir. 2000).

For the forgoing reasons, the Court concludes that Plaintiff has not shown Defendant's dispatcher issue to be pretext.

e. Officer Morale and Allegations of Favoritism

Plaintiff argues that the morale and favoritism issue was pretext because: (1) officer morale and favoritism existed for over a year as indicated by the needs assessment, and it was understood that problems in the police department would take 2 to 3 years to resolve under new leadership; and (2) no one met with Plaintiff to discuss these issues. [Doc. 50 at 41-42].[27]

i. Prevalence of Low Morale

The Court concludes that the existence of low morale and

---

[27] Plaintiff also contends that the following reasons show pretext: (1) Plaintiff received an excellent performance evaluation; (2) Fairburn did not perform any investigation into low morale or favoritism; (3) Fairburn did not offer Plaintiff an opportunity to respond to the allegations; (4) the issue was not discussed at prior council meetings; and (5) Williams's statement. [Doc. 50 at 42]. The Court has previously addressed these arguments, so it will not repeat its discussion.

favoritism at the time of the issuance of the needs assessment does not show pretext. Fairburn brought Chief Brown and Plaintiff to the FPD to remedy these problems of low morale and favoritism. With Plaintiff and Chief Brown's arrival, the issue of favoritism should have at least diminished because new leadership presumably would not engage in favoritism. However, allegations of favoritism arose after Plaintiff's creation of the STOP unit and the treatment of STOP unit members after it was disbanded. (*See* D ¶ 79; Williams Decl. ¶ 6 in Doc. 27 at Exh. 1). This problem of favoritism, therefore, was not a remnant of the previous FPD leaders, but instead was a direct result of Plaintiff's decisions. Although favoritism may have been an ongoing issue, the undisputed evidence indicates that Plaintiff helped create a new reason for FPD officers to perceive favoritism, namely the treatment of STOP officers. Also, the mere fact that the FPD had experienced low morale prior to Plaintiff's arrival does not absolve Plaintiff from trying to remedy this problem or require Defendant to ignore the issue under Plaintiff and Chief Brown. Although Williams may have recognized that it would take two to three years to fix problems addressed in the needs assessment, Williams was discussing a number of problems, not solely low morale. (*See* Williams Dep. at 54-55). Therefore, if low morale persisted under Plaintiff's management, Fairburn could fire Plaintiff for this reason. *See Swider v. Ha-Lo Industries, Inc.*, 134 F. Supp. 2d 607, 627 (D. N.J. 2001) (indicating that employee being responsible for low morale is a legitimate reason for termination).

ii. Failure to Discuss Morale/Favoritism with Plaintiff

The Court concludes that Defendant's failure to discuss morale or favoritism issues with Plaintiff is not evidence of pretext in this case. As discussed above, the failure to warn can be evidence of pretext. *See Stone*, 841 F. Supp. at 1188; *Evans*, 579 F. Supp. at 1395 n.6. Although there is no specific evidence that Fairburn directly warned Plaintiff that low morale was an issue in its displeasure with his employment, the December 2002 assessment cited low morale as a problem in the FPD. (P ¶ 3). Chief Brown

was expected to correct problems that the assessment reported. (Williams Dep. at 55). Although Williams did not directly bring his concerns to Plaintiff, Williams informed Chief Brown of these concerns. If Chief Brown failed to pass these concerns on to Plaintiff, Defendants should not be held liable, especially in light of the evidence showing poor morale in the FPD. Accordingly, the Court will not consider Defendant's failure to directly warn Plaintiff about concerns with morale as evidence of pretext.

Although the Plaintiff has provided circumstantial evidence that Plaintiff was terminated in part for an "inaccurate" investigation, this evidence alone is not sufficient. *See Rojas*, 285 F.3d at 1343. Plaintiff has not produced any other evidence of pretext because he failed to rebut all legitimate reasons provided by Defendant. *See Chapman*, 229 F.3d at 1037; *Combs*, 106 F.3d at 1539-43. Therefore, the evidence of Williams's statement by itself is not sufficient to establish pretext.

Accordingly, the Court **RECOMMENDS** that summary judgment be **GRANTED** on Plaintiff's Title VII retaliation claim.[28]

C. First Amendment Retaliation

Defendant claims that Plaintiff cannot establish a First Amendment retaliation claim, in part because Plaintiff's conduct did not involve a matter of public concern as the report was part of Plaintiff's job duties, the report failed to find unlawful conduct, and Plaintiff never tried to publicize his findings. [Doc. 27 at 8-11]. Plaintiff responds that his activity involved a matter of public concern in part because his case was "virtually identical" to *Tindal v. Montgomery County Comm'n*, 32 F.3d 1535 (11th Cir. 1994), and "very similar" to the facts of *Fikes v. City of Daphne*, 79 F.3d 1079 (11th Cir. 1996). [Doc. 50 at 9-13].

---

[28] Because the Court concludes that Plaintiff cannot establish a Title VII case of retaliation, the Court will not address Defendant's mixed motive argument.

"[A] State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983). To state a claim of retaliation for exercising one's First Amendment rights, a plaintiff must: (1) "demonstrate that his speech involved a matter of public concern"; (2) establish that his interests as a citizen in commenting about a matter of public concern outweighed the interest of the state as an employer to efficiently and effectively perform its functions, (the *Pickering* balancing test); and (3) show that "his speech played a substantial part in the [public employer's] decision to fire[[29]] him." *See Jackson v. State of Ala. State Tenure Comm'n*, 405 F.3d 1276, 1282 (11th Cir. 2005). Where a plaintiff establishes these three elements, a defendant can avoid liability if it proves "by a preponderance of the evidence that it would have fired him regardless of his speech," (i.e., the *Mt. Healthy* defense). *Id.*

"Speech addresses a matter of public concern when the speech can be 'fairly considered as relating to any matter of political, social, or other concern to the community.'" *Fikes*, 79 F.3d at 1084 (quoting *Connick*, 461 U.S. at 146). Therefore, Courts do not review a public employer's personnel decisions "[w]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest." *Connick*, 461 U.S. at 147. The mere fact that the speech is "related to matters of public interest" alone is insufficient. Instead, "the purpose of the expression must be to present such issues as matters of 'public' concern." *Morris v. Crow*, 142 F.3d 1379, 1381-82 (11th Cir. 1998). The relevant inquiry is "'whether the speech at issue was made

---

[29] A plaintiff in a First Amendment retaliation case must also show that he suffered an adverse employment action. *Stavropoulos v. Firestone*, 361 F.3d 610, 618 (11th Cir. 2004). As discussed above in the Title VII context, Plaintiff's forced resignation constitutes an adverse employment action. *See id.* at 619 (indicating that the Title VII adverse employment action standard is "consonant" with the First Amendment retaliation adverse action standard).

primarily in the employee's role as citizen, or primarily in the role of employee.'" *Id.* at 1382 (quoting *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993). To determine whether speech is a matter of public concern, the Court examines the "the content, form, and context of the speech." *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1157 (11th Cir. 2002). The "content, form, and context" analysis is "vital" to determining whether speech is protected because "virtually all speech which is made in and about a public employment setting will have some public significance." *Ferrara v. Mills*, 781 F.2d 1508, 1516 (11th Cir. 1986).

The fact that a public employee failed to speak publicly about a matter does not remove the employee's speech from the purview of the First Amendment. *See Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 413-14 (1979) ("We are unable to agree that private expression of one's views is beyond constitutional protection."). However, "the employee's attempt at public communication is still a relevant factor in the 'public concern' analysis." *Deremo v. Watkins*, 939 F.2d 908, 911 n.3 (11th Cir. 1991).

The Court concludes that Plaintiff's speech does not constitute a matter of public concern. The Court recognizes that Plaintiff's speech was not motivated by personal interest and therefore could fall within the ambit of constitutionally protected speech because Plaintiff was investigating Tallman's claim of sexual harassment and gained very little personally for conducting such an investigation. *See Connick*, 461 U.S. at 147. Therefore, the Court will determine whether the form, content, and context of Plaintiff's speech show that Plaintiff was speaking as a citizen on a matter of pubic concern. *See Morris*, 142 F.3d at 1382; *Brochu*, 304 F.3d at 1157.

As an initial matter, the only elements of Plaintiff's report that could feasibly involve a matter of public concern are the hostile work environment and verbal harassment portions of the report,

because they suggest Plaintiff was speaking about gender discrimination in the FPD. *See Morgan*, 6 F.3d at 755 n.7 (agreeing that "that the general subject of sexual harassment in the workplace is a matter of public concern, [but noting that] each complaint must be assessed on a case-by-case basis"). The remaining portion of the report involves misconduct by one police officer, Smith, who was accused of violating internal FPD policies, rules, and procedures involving insubordination, gossip/rumors, mutinous conduct, providing false statements, and failing to support. (Investigative Report in Doc. 50, Exh. 6 at TC-0006). Clearly, the issue of whether Smith's conduct violated these internal FPD rules is a personnel matter involving the employer and employee, not a matter of public concern. *See Connick*, 461 U.S. at 147 ("[A] federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."). Thus, the only portion of Plaintiff's report that potentially could involve a matter of public concern is the section dealing with verbal harassment and hostile work environment. However, a number of factors prevent this speech from being considered a matter of public concern.

First, the context of Plaintiff's speech establishes that his investigation and report were a result of his duty as an employee to investigate Tallman's complaints. Although sexual harassment in the FPD is a matter of public interest, this does not automatically transform Plaintiff's speech into a matter of public concern. *See Morris*, 142 F.3d at 1382 (observing that although police reports and information concerning police conduct reflect information of general public interest, which could be considered to reach matters of public interest, "[t]he fact that such information may be of general interest to the public, however, does not alone make it of 'public concern' for First Amendment purposes"); *Gonzalez v. City of Chicago*, 239 F.3d 939, 941 (7th Cir. 2001) ("[S]peaking up on a topic that may be deemed one of public importance does not automatically mean the employee's statements address a matter of public concern . . . .") (quoting *Kokkinis v. Ivkovich*, 185 F.3d 840, 844 (7th Cir. 1999)).

Plaintiff had a job responsibility to perform the investigation and write the report. (D ¶ 16; Crawford Dep. at 109-10). In other words, his report involved speech resulting from his job duties, not from his role as a citizen complaining about sexual harassment. *See Morris*, 142 F.3d at 1382; *see also Connick*, 461 U.S. at 143 ("The repeated emphasis in *Pickering* [*v. Board of Education*, 391 U.S. 563 (1968)], on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental" because it "reflects . . . the common-sense realization that government offices could not function if every employment decision became a constitutional matter.").

Plaintiff engaged in the investigation, wrote a summary report, and compiled his documentation for the sole purpose of responding to Tallman's complaint as his job duties required. (*See* D ¶ 16). Plaintiff did not do anything more than write his report. *See Morris*, 142 F.3d at 1382-83 (holding that a police officer's report "generated in the normal course of his duties" regarding his investigation into a traffic accident involving another officer that killed a citizen was not a matter of public concern because the report was prepared as part of the officer's job); *Gonzalez*, 239 F.3d at 942 (holding that "[s]peech which is made in all respects as part of the employee's job duties is generally not the protected expression of the public employee" but noting that this is not a *per se* rule); *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir. 1988) (holding that a fire marshal's routine report concerning the cause of a fire did not address a matter of public concern).[30] Plaintiff did not even seek to

---

[30] The Court is aware of authority from other circuits holding that an internal report can constitute speech on a matter of public concern. *See Ceballos v. Garcetti*, 361 F.3d 1168, 1176, 1178 (9th Cir. 2004) (holding that plaintiff's preparation of a memorandum in fulfillment of a regular employment responsibility does not serve to deprive him of the First Amendment protection afforded to public employees and citing cases in which other Circuits have failed to establish a *per se* rule requiring that a public employee does not receive any First Amendment protection for speech that occurs within the scope of his employment duties). However, the combination of the context, form, and content of Plaintiff's report

communicate his report publicly, and only discussed it with Chief Brown. (*See* Crawford Dep. at 27, 270-71). *See Deremo*, 939 F.2d at 911 n.3. Therefore, the context of Plaintiff's report - - he was privately responding to Tallman's complaint under his job duties - - suggests that his report did not involve a matter of public concern. *Cf. Morgan*, 6 F.3d at 755 (holding that an employee's testimony regarding sexual harassment against a co-worker was not a matter of public concern because "the main thrust of [the plaintiff's] speech took the form of a private employee grievance"); *see also Maggio v. Sipple*, 211 F.3d 1346, 1353 (11th Cir. 2000) (holding that a plaintiff's testimony before an administrative hearing on behalf of her supervisor was not a matter of public concern because, *inter alia*, the plaintiff was supporting a private grievance); *Watkins v. Bowden*, 105 F.3d 1344, 1353 (11th Cir. 1997) (holding that plaintiff's "expression of concern over her colleagues' treatment of [a co-worker] was made in her capacity as employee, rather than in her 'role as citizen.'") (quoting *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir. 1988).

Second, the Court concludes that the form of Plaintiff's report indicates that Plaintiff's speech was not a matter of public concern, because the report's form was merely an internal report that used language from the FPD standard operating procedures. (*See* Crawford Dep. at 283; Investigative Report in Doc. 50, Exh. 2 at TC-0007). *See Gonzalez*, 239 F.3d at 941 (indicating that the form of speech - - a routine office report - - did not show the matter to be of public concern). The report did not go beyond the language that office policy required.

A third factor in this Court's determination that Plaintiff's report did not involve a matter of public concern was the contents of the report. The report used the language in the standard operating procedures and then Plaintiff failed to explain these general conclusions. As discussed above in relation to the Title VII

---

fail to establish that his speech involved a matter of public concern.

opposition clause, Plaintiff's report did not clarify that Plaintiff was opposing any conduct that involved a matter of public concern. The report did not sustain the hostile work environment allegation, nor did it explain this finding. Although the Court understands Plaintiff mistakenly believed that a hostile work environment entailed a fear of one's safety, (Crawford Dep. at 288), this is not explained anywhere in the contents of the report. Therefore, the report fails to explicitly show that there was a finding of sexual harassment finding. (*See generally* Investigative Report in Doc. 50 at Exh. 6).

As for the report's conclusion of "Sustaining Other" for the verbal harassment allegation, the report does not explain what verbal harassment entailed. Without any explanation as to these findings, the contents of the report do not clearly indicate that Plaintiff's speech involved a matter of public concern. Plaintiff's report, therefore, created an ambiguous record of his findings regarding Tallman's complaints and, at the most, hinted at Plaintiff's opposition to Smith's alleged sexual harassment, using the standard language of FPD internal investigation reports. Even if Plaintiff intended to oppose a matter of public concern, the content of his report does not show that the report involved a matter of public concern or sought to expose a matter of public concern. *See Fikes*, 79 F.3d at 1984 (holding that plaintiff's report of police misconduct constituted speech involving a matter of public concern because the plaintiff "sought to 'bring to light actual or potential wrongdoing or breach of public trust on the part of' government officials") (quoting *Connick*, 461 U.S. at 148)); *Baldassare v. State of N.J.*, 250 F.3d 188, 197-98 (3d Cir. 2001) (determining that plaintiff's internal report constituted a matter of public concern because the report tried to expose wrongdoing). Thus, the content of the report does not clearly express any opposition to a matter of a public concern, but merely used the required language for internal investigation reports. *See Gonzalez*, 239 F.3d at 941 (indicating that an internal report was not a matter of public concern in part because the content of the report involved required opinions on misconduct).

As for Plaintiff's argument that *Tindal* was "virtually identical" to his case, the Court disagrees. Although the plaintiff in *Tindal* opposed harassment of coworkers, as Plaintiff alleges that he does, the plaintiff in *Tindal* clearly and voluntarily opposed the harassment conduct in a federal district court proceeding. *See Tindal*, 32 F.3d at 1540. In the instant case, Plaintiff opposed conduct during the course of his job duties. Also, this case is distinguishable from *Fikes* because the plaintiff in *Fikes* voluntarily reported officer misconduct, *Fikes*, 79 F.3d at 1081, while Plaintiff acted under his job duties to investigate and report his findings. Accordingly, the Court finds neither case to support Plaintiff's position.

Because the context, form, and content of Plaintiff's speech fail to establish that Plaintiff's speech involved a matter of public concern, the Court need not analyze the remaining elements of his § 1983 First Amendment retaliation claim. *See Cooper v. Smith*, 89 F.3d 761, 765 (11th Cir. 1996) ("If the speech does not involve an issue of public concern, our inquiry ends there."). Accordingly, the Court **RECOMMENDS** that summary judgment be **GRANTED** on Plaintiff's § 1983 claim.

V. CONCLUSION

For the foregoing reasons, the undersigned **RECOMMENDS** that Defendants' motion for summary judgment [Doc. 27] be **GRANTED** as to all claims. The Clerk is **DIRECTED** to terminate the reference of this matter to the undersigned.

IT IS SO RECOMMENDED and DIRECTED, this the 1st of February, 2006.

s/ Alan J. Baverman
ALAN J. BAVERMAN
UNITED STATES MAGISTRATE JUDGE

68

(2)

No. 07-233

FILED
SEP 21 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DANIEL CRAWFORD,

Petitioner,

v.

CITY OF FAIRBURN, GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

R. READ GIGNILLIAT
Counsel of Record
WILLIAM D. DEVENEY
JENNIFER H. KEATON
ELARBEE, THOMPSON, SAPP & WILSON, LLP
229 Peachtree Street, NE
800 International Blvd.
Atlanta, GA 30303
(404) 659-6700

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF QUESTION PRESENTED

Did the District Court properly enter summary judgment for the defendant-employer in an employment discrimination case in which the defendant-employer articulated more than one legitimate, nondiscriminatory reason for the decision to terminate the plaintiff-employee's employment, and the plaintiff-employee failed to show pretext as to each of those reasons.

PARTIES

The parties to this action are set forth in the caption.

TABLE OF CONTENTS

	Page
Restatement of Question Presented	i
Parties	ii
Table of Contents	iii
Table of Authorities	iv
Counter-statement of the Case	1
Reasons for Denying the Writ	4
I. Crawford Mischaracterizes the Fifth and Eleventh Circuits' Case Law	5
II. Crawford Mischaracterizes the Third, Sixth, Seventh and Tenth Circuits' Case Law	16
III. There Is No Split in the Circuits as to Those Circumstances Under Which the General Rule May Not Apply	21
IV. The Eleventh Circuit Correctly Held that Crawford's Claim Was Subject to Dismissal Pursuant to the General Rule	28
Conclusion	32

TABLE OF AUTHORITIES

Page

CASES

Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*) 26, 27

Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976) 19

Bojd v. Golder Assocs., 212 Fed. Appx. 860 (11th Cir. 2006) 24

Borden v. Johnson, 196 Ga. App. 288, 395 S.E.2d 628 (1990) 20, 21

Bryant v. Farmers Ins. Exch., 432 F.3d 1114 (10th Cir. 2005) 22, 23

Cash Distrib. Co. v. Neely, 947 So.2d 286 (Miss. 2007) 14, 15

Chapman v. AI Transp., 180 F.3d 1244 (11th Cir. 1999) 10

Chapman v. AI Transp., 229 F.3d 1012 (11th Cir. 2000) (*en banc*) ..... *passim*

Combs v. Plantation Patterns, Meadowcraft, Inc., 106 F.3d 1519 (11th Cir. 1997) 6, 7, 10, 11

Fuentes v. Perskie, 32 F.3d 759 (3rd Cir. 1994) 16, 18, 31

Green v. Sun Trust Banks, Inc., 197 Ga. App. 804, 399 S.E.2d 712 (1990) 20

Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993) 18, 19, 20

Hinrichs v. Tranquilaire Hospital, 352 So.2d 1130 (Ala. 1977) 21

TABLE OF AUTHORITIES – Continued

Page

Hurlbert v. St. Mary's Health Care Sys., Inc., 439 F.3d 1286 (11th Cir. 2006) 25

Jaramillo v. Colorado Judicial Dep't, 427 F.3d 1303 (10th Cir. 2005) ..... *passim*

Laxton v. Gap Inc., 333 F.3d 572 (5th Cir. 2003) 13, 15, 24

Massachusetts v. EPA, ___ U.S. ___, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) 28

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) 16, 19

Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181 (11th Cir. 1984) 12, 19

Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) 21

Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) 18, 19

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) 8, 32

Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 528 S.E.2d 238 (2000) 20

Reilly v. Alcan Aluminum Corp., 221 F.3d 1170 (11th Cir. 2000) 20

Russell v. Acme-Evans Co., 51 F.3d 64 (7th Cir. 1995) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Sher v. United States VA, 488 F.3d 489 (1st Cir. 2007) 16

Sledge v. Goodyear Dunlop Tires N. Am., 275 F.3d 1014 (11th Cir. 2001) 11

Smith v. Chrysler Corp., 155 F.3d 799 (6th Cir. 1998) 16, 23

Smith v. Piezo Technology & Professional Adm'rs, 427 So.2d 182 (Fla. 1983) 21

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) 7, 32

Strong v. University Healthcare Sys., L.L.C., 482 F.3d 802 (5th Cir. 2007) 25

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) 5, 8, 9

Tyler v. RE/MAX Mt. States, Inc., 232 F.3d 808 (10th Cir. 2000) 16, 22, 23

Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763 (11th Cir. 2005) 12

Wallace v. Methodist Hosp. Sys., 271 F.3d 212 (5th Cir. 2001) 12, 13, 14, 15, 24

Wolff v. Buss Am. Inc., 77 F.3d 914 (7th Cir. 1996) 24, 31

Zaccagnini v. Chas. Levy Circulating Co., 338 F.3d 672 (7th Cir. 2003) 25

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* 18, 19, 20

Employee Retirement Income Security Act, 29 U.S.C. § 1140 20

Mont. Code Ann. § 39-2-901 21

O.C.G.A. § 34-7-1 20

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 18, 29, 31

RULE

11th Cir. R. 36-2 24

OTHER AUTHORITY

B. Garner, *A Dictionary of Modern Legal Usage* (2nd ed. 1995) 7

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent City of Fairburn, Georgia ("City"), respectfully requests that this Court deny the Petition for Writ of *Certiorari* ("Petition") submitted by Petitioner Daniel Crawford.

COUNTER-STATEMENT OF THE CASE

Crawford's Statement of the Case omits several undisputed facts that properly led the United States Court of Appeals for the Eleventh Circuit to affirm the grant of summary judgment against him. In the Fall of 2002, the City retained the Georgia Association of Chiefs of Police to perform an assessment of its Police Department. (*See* Pet. App. 23a.) That assessment subsequently identified "pervasive problems of management and morale." (*See* Pet. App. 4a. *See also* Pet. App. 23a-24a.) During that same time, the City was required to pay a large sum of back wages to its officers for failing to pay overtime for attendance at mandatory staff meetings. (*See* Pet. App. 38a n.12.) It was against this backdrop that the City hired Frederick Brown as its new Chief of Police in February 2003 and, upon Brown's recommendation, created the position of Major and hired Crawford to fill the same in March 2003. (*See* Pet. App. 4a, 19a, 24a.)

Prior to Brown or Crawford's employment, in September 2002, Officer Louise Tallman had filed an internal complaint contending that a verbal altercation

with Sergeant James Smith, during which he allegedly told her that she was useless, did nothing and was hired to fend off a lawsuit, constituted sexual harassment. (*See* Pet. App. 23a, 49a.) Tallman filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") regarding the alleged incident in December 2002. (*See* Pet. App. 23a.) The City submitted its position statement and supporting evidence to the EEOC on February 18, 2003, several weeks *before* Crawford began his employment with the City. (*See* Pet. App. 14a n.3.)

Approximately nine months later, Tallman filed another internal complaint against Smith alleging that he had sexually harassed her by standing too close to her during the Department's firearms qualifications test in November 2003. (*See* Pet. App. 14a n.3, 25a.) Crawford, in keeping with his position within the Department and his duties related to personnel matters and internal affairs investigations, was assigned by Brown to investigate this second internal complaint. (*See* Pet. App. 4a-5a, 24a.) Contrary to Crawford's allegations, however, there is no evidence that "City officials" generally were "very displeased" by the nature of his investigation." (*See* Pet., p. 2.) Instead, Crawford alleged that the City Administrator, James Williams, made certain remarks during a meeting with him as generally set forth in the Petition's Statement of the Case. (*See* Pet., p. 2.) Williams denied these allegations, but admitted that he had issues with both the scope and conduct of Crawford's investigation. (*See* Pet. App.

12a-13a, 14a-15a, 34a n.9.) Nevertheless, it is undisputed that Williams made no effort to restrict Crawford's investigation or to influence its outcome; to the contrary, Williams cooperated with Crawford's expansion of the investigation. (*See* Pet. App. 13a.)

In January 2004, Crawford provided Brown with an investigative report consisting of a one-page summary and over 400 pages of attachments, which Brown, in turn, provided to Williams. (*See* Pet. App. 27a-29a.) Crawford did not discuss his report with anyone other than Brown. (*See* Pet. App. 44a.) On its face, the report indicated that the investigation had failed to sustain Tallman's allegation of a hostile work environment while sustaining her allegation of verbal harassment on "[o]ther" grounds, meaning "misconduct other than that charged occurred." (*See* Pet. App. 27a-29a. *See also* Pet. App. 5a.) Although Crawford suggests that his report was detrimental to the City's interests, Williams, the City Clerk/Personnel Director Nancy Faulkner, the City Council, and Mayor Betty Hannah all believed that Crawford's investigation had concluded that Tallman had not been subject to any unlawful harassment. (*See* Pet. App. 5a. *See also* Pet. App. 14a, 34a-35a.)

At a City Council meeting on February 27, 2004, the Mayor and Council voted to place Brown on probation and to eliminate the position of Major from the Department, thereby effectively terminating Crawford's employment with the City. (*See* Pet. App. 38a.) Brown testified that, following the Council meeting, Williams indicated to him that the reasons

for Crawford's discharge included (1) complaints from a dispatcher, Nicole Wood-Norman, (2) the Department's continued patrol of Interstate 85, and (3) new complaints by officers regarding the failure to receive overtime pay. (*See* Pet. App. 12a, 13a n.2, 38a. *See also gen'lly* Pet. App. 35a-38a.) Williams testified that general complaints of low morale and favoritism in the Department had formed the basis of the Mayor and Council's decision as well. (*See* Pet. App. 12a, 35a-38a, 73a-74a. *See also* Pet. App. 13a n.2.) Brown, who was not at the meeting itself, also testified that Williams mentioned the "accuracy" of the internal affairs investigation. (*See* Pet. App. 38a, 74a.)

The Magistrate Judge's report and recommendation, the district court's order, and the court of appeals' opinion speak for themselves, and their contents are discussed more fully below in Part IV in connection with the particular issues raised by the Petition.

REASONS FOR DENYING THE WRIT

No compelling reason warrants the granting of a writ of *certiorari* in this case. Crawford's assertions notwithstanding, the Eleventh Circuit's case law is not in substantive conflict with the case law of the other federal circuits. At most, Crawford's Petition rests upon the Mississippi Supreme Court's misreading of a single Fifth Circuit panel opinion.

I. CRAWFORD MISCHARACTERIZES THE FIFTH AND ELEVENTH CIRCUITS' CASE LAW.

Crawford petitions this Court to grant a writ of *certiorari* in this case in order to resolve a purported split between the circuits as to the following issue:

> In an employment discrimination case in which an employer proffers *multiple* reasons for an allegedly unlawfully motivated dismissal, can the plaintiff establish a violation of the law by proving that one such reason was a pretext for discriminatory animus, or must the plaintiff go further and also separately and "directly rebut" each and every other reason.

(*See* Pet., p. i.) (Emphasis in original.) Crawford contends that the purported "absolute requirement" of the latter showing in the Fifth and Eleventh Circuits is in conflict with the case law of the Third, Sixth, Seventh and Tenth Circuits, as well as with that of the State of Mississippi. (*See* Pet., p. 20. *See also* Pet., pp. 12-18.) As discussed below, Crawford's contention is based upon a misreading of the majority opinion in *Chapman v. AI Transp.*, 229 F.3d 1012 (11th Cir. 2000) (*en banc*), and the existing case law of the other circuits.

In *Chapman*, the primary issue before the court was whether an employer could carry its burden of production under *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-56, 101 S. Ct. 1089, 1094-95, 67 L. Ed. 2d 207, 216-17 (1981), by articulating a

subjective reason for the employment action at issue. *See Chapman*, 229 F.3d at 1016, 1040. The employer had articulated two reasons for rejecting the plaintiff's application for a new position: a "subjective" one, *i.e.*, a "poor interview"; and an "objective" one, *i.e.*, a "lack of 'stability in light of the number of jobs he had held in a short period of time'" (or "job-skipping"). *See id.* at 1028, 1054. The majority held that "[a] subjective reason is a legally sufficient, legitimate, nondiscriminatory reason if the defendant articulates a clear and reasonably specific factual basis upon which it based its subjective opinion." *See id.* at 1034. Having held that "[s]ubjective reasons can be just as valid as objective reasons," *see id.*, the majority then concluded that, because the plaintiff had failed to produce "sufficient evidence to create a genuine issue of pretext as to either" of the employer's reasons for not hiring him, summary judgment for the employer was appropriate, *see id.* at 1037. In so holding, the majority relied upon a panel opinion "requiring a plaintiff to rebut 'all of the defendant's proffered nondiscriminatory reasons for its action.'" *See id.* (*quoting Combs v. Plantation Patterns, Meadowcraft, Inc.*, 106 F.3d 1519, 1543 (11th Cir. 1997)).

The dissent in *Chapman* agreed with the "general rule" as stated in *Combs*. *See* 229 F.3d at 1049.[1]

[1] Judge Birch, who was a member of the *Combs* panel, styled his opinion in *Chapman* as a concurrence in part and a dissent in part. *See* 229 F.3d at 1040. However, because Judge

(Continued on following page)

The dissent, however, asserted that the majority's focus should have been "upon the dispositive weight to be accorded an employer's purely subjective rationale for a putative non-discriminatory adverse employment action." *See id.* at 1040. The dissent opined that "[s]ome subjective reasons, those which cannot be objectively evaluated and/or are vague, should be accorded no weight," while still "[o]ther subjective reasons, such as those that are premised on stereotypes, should be scrutinized strictly." *Id.* at 1048. *See also gen'lly id.* at 1044-48. The dissent further opined that subjective reasons should be accorded less weight if they are not "consistent with clear criteria that preexisted the adverse employment action." *Id.* at 1048.

The majority in *Chapman* did not address this particular argument, but this Court has. In *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509, 113 S. Ct. 2742, 2748, 125 L. Ed. 2d 407, 417 (1993), this Court held that "the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination)

Birch did not join in either the majority's analysis or decision with regard to the issues presented here, as well as for reasons of convenience, the City will refer to his opinion as the "dissent." *See* B. Garner, *A Dictionary of Modern Legal Usage*, p. 194 (2nd ed. 1995) ("To American judges [concurrence] has two senses: (1) 'to join in a judicial decision, adopting the reasoning and result as one's own; (2) to join in a judicial decision while not agreeing with the ground expressed in the majority opinion supporting the decision.").

can involve no credibility assessment." *See also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105, 117 (2000) (same). So long as the employer has offered into evidence a "clear and reasonably specific" reason for its decision, it has carried its burden under *Burdine*. *See* 450 U.S. at 258, 101 S. Ct. at 1096, 67 L. Ed. 2d at 218. *See also id.* at 254 & n.9, 101 S. Ct. at 1095 & n.9, 67 L. Ed. 2d at 216 & n.9 (discussing the employer's burden). Thus, the dissent in *Chapman* was mistaken in urging greater limitations upon an employer's ability to carry its burden of production under *Burdine* when the articulated reason is a "subjective" one.

Nevertheless, from this shaky platform, the dissent then proceeded to the question of whether, when a defendant articulates "multiple" – in that case, two – reasons for its decision, a plaintiff is required to proffer evidence that each reason is pretextual. *See id.* at 1049-51. The dissent opined that, while the general rule requiring a plaintiff to show pretext as to each reason "accords well with common sense" and "is reasonable in the majority of cases, [it] fails when applied to a small percentage of cases." *See id.* at 1049-50. *See also id.* at 1050 n.32 ("the percentage of cases affected by the exception is quite small"). Thus, the dissent urged the adoption of four so-called "exceptions" to the general rule: "where two legitimate reasons proffered by an employer are intertwined"; "where the showing of pretext as to one reason is sufficiently strong as to permit a jury to find

that the employer (or its decisionmaker) lacks all credibility"; where a "large number of arguably pretextual reasons" are proffered; and "where an employer offers an objective reason for its employment action . . . and a subjective reason. . . . , [and] the plaintiff has offered evidence establishing pretext as to the objective reason." *See id.* at 1050-51.

The majority in *Chapman* specifically considered the dissent's argument in this regard, but rejected it as follows:

> The dissenting opinion would carve out a number of exceptions to the well-established rule that a plaintiff must show pretext as to each proffered reason. *To the extent this case presents a factual basis for any such exception, we reject that exception. To the extent this case does not present a factual basis for such an exception, we express no view on whether that exception might exist in some cases with different facts.*

See id. at 1037 n.33. (Emphasis supplied.) Therefore, the majority did not foreclose altogether a plaintiff's ability to show pretext using circumstantial evidence even when he is unable to rebut all of a defendant's articulated reasons. The majority simply held that the facts in that case did not bring it within that "small percentage of cases" contemplated by the dissent and, thus, did not require the majority to express a view as whether any of the exceptions urged by the dissent might be appropriate in another case presenting different facts. Accordingly, the

Chapman majority did not "emphatically reject[ ]" the dissent's argument that any such exception to the general rule might exist, as Crawford asserts (*see* Pet., p. 9), but merely exercised proper judicial restraint in choosing not to hold forth generally on issues that were not presented by the facts of the case before it.[2]

The plaintiff in *Chapman* did not offer (at least in the majority's opinion) any evidence tending to show that his age motivated the employer in rejecting his application. The plaintiff did not allege prior discriminatory treatment or ageist comments, although he did seek to rely upon the final decision-makers' deposition testimony that he was, *inter alia*, not "aggressive" in answering questions during his interview. *See* 229 F.3d at 1020. *See also* 229 F.3d at 1028 n.14. The dissent believed that term should have been viewed as "age bias" or, at least, as "highly suspicious." *See* 229 F.3d at 1046-47. The majority, however, declined to accord such an interpretation to that term either as a general matter or in light of the facts of that particular case. *See* 229 F.3d at 1036. Thus, the majority in *Chapman* concluded that the

---

[2] Indeed, the vacated panel opinion in *Chapman*, also written by Judge Birch, had not found it necessary to rely upon any exception to *Combs* in finding summary judgment inappropriate. That opinion had held simply that the employer had failed to carry the "increased burden" on summary judgment that the panel believed to be "appropriate where the defendant's proffered justification is highly subjective." *See Chapman v. AI Transp.*, 180 F.3d 1244, 1250 (11th Cir. 1999).

plaintiff had failed to show either of the employer's articulated reasons to be false or otherwise pretextual. *See id.* at 1037.[3]

As even the dissent in *Chapman* conceded, any exceptions to the general rule articulated in *Combs* would apply in, at most, a "quite small" number of cases. *See Chapman*, 229 F.3d at 1049-50 n.32. Nevertheless, contrary to Crawford's suggestion, the Eleventh Circuit has, subsequent to *Combs*, found summary judgment to be inappropriate even when the employer's reason is undisputed. *See, e.g., Sledge v. Goodyear Dunlop Tires N. Am.*, 275 F.3d 1014, 1019-20 (11th Cir. 2001) (holding that a plaintiff who indisputably failed a maintenance mechanic exam showed that reason could be a mere pretext for race discrimination when, *inter alia*, only one of 107 mechanics was black and the white applicant hired also failed the exam). And other decisions since the *en banc* court's decision in *Chapman* further belie

[3] The plaintiff in *Combs* had likewise failed to present any evidence from which a fact-finder might reasonably infer discrimination. In that case, the plaintiff testified at trial that he had been asked to "hide" from visiting officials from the company's headquarters on one occasion, and implied that he had been asked to do so because of his race. *See* 106 F.3d at 1525. The plaintiff, however, conceded on cross-examination that he was never told that his race was the reason for his supervisor's request, and the supervisor testified that the plaintiff had been asked to hide because headquarters had not approved the plaintiff's position. *See id.* at 1525. Thus, the plaintiff's evidence in *Combs* ultimately was nothing more than a mere disagreement with the employer's reasons. *See id.* at 1538-43.

Crawford's contention that a plaintiff's inability to prove *all* of an employer's reasons to be false is an "absolute" bar to a finding of pretext in the Eleventh Circuit. *See, e.g., Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 772 (11th Cir. 2005) (reversing grant of summary judgment based on evidence of racially-tinged statements by the decisionmakers, the relative superiority of the plaintiff's qualifications, the employer's disregard for its own regulations, and the plaintiff's rebuttal of "many" of the employer's proffered justifications).

Crawford's characterization of the holding in *Chapman*, however, is disproved most convincingly by those cases in which the employer's articulated reason is the violation of a work rule, and wherein the Eleventh Circuit has long held that "[w]hen an individual proves that he was fired but one outside his class was retained, although both violated the work rule, this raises an inference that the rule was discriminatorily applied against that individual." *See Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1186 (11th Cir. 1984). There is no indication whatsoever that *Chapman* prevents employees from challenging an employer's legitimate, nondiscriminatory reason(s) based upon such facts.

On this point, Crawford also misreads *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212 (5th Cir. 2001), and the Fifth Circuit's existing case law. In *Wallace*, the employer articulated two reasons for the plaintiff's discharge: she had performed a procedure without authorization; and she had falsified medical

records regarding the same. *See id.* at 221. It was undisputed that the plaintiff had engaged in both acts. *See id.* at 221, 226. The plaintiff nevertheless alleged that she was subject to sex discrimination because other employees who had engaged in the same or similar conduct, but who were not pregnant, were treated more favorably. *See id.* at 221.

The panel found that the plaintiff had created a genuine issue of material fact as to the first reason because a non-pregnant nurse had received only a verbal reprimand for similar conduct. *See id.* at 221-22. The panel, however, noted that the employer had articulated "two *independent* reasons for terminating [the plaintiff], each of which alone could have served as a basis for terminating her." *See id.* at 221-22. (Emphasis in original.) *See also id.* at 222 n.14 ("We note that [the employer] did not assert that these two acts together constituted a single nondiscriminatory reason for [the plaintiff's] termination"). As to the second reason, the panel found that not only had the plaintiff failed to proffer evidence that any non-pregnant employee had received more favorable treatment, but the record reflected that another non-pregnant nurse had been terminated for the same conduct. *See id.* at 222.[4]

---

[4] A Fifth Circuit panel subsequently reached a different conclusion in another pregnancy discrimination case. In *Laxton v. Gap Inc.*, 333 F.3d 572, 579 (5th Cir. 2003), the employer asserted that the plaintiff had engaged in five violations of store policy, "the cumulative effect of which justified" her discharge.

(Continued on following page)

Contrary to Crawford's suggestion, the *Wallace* panel did not terminate its legal analysis based upon the plaintiff's mere inability to dispute each of the employer's articulated reasons. Instead, part "C" of the panel's opinion addressed whether certain alleged comments "constituted sufficient evidence of discrimination." *See id.* at 222. The panel, nevertheless, held that the comments were mere "stray remarks" and not otherwise probative of discriminatory intent. *See id.* at 222-24.

Finally, in part "D" of its opinion, the *Wallace* panel considered, but rejected, the plaintiff's arguments that discriminatory intent could be inferred from alleged inadequacies in the employer's investigation of her internal complaint, the employer's failure to investigate additional allegations made during an informal grievance hearing, and anecdotal notes kept by her supervisor. *See id.* at 224-26. Thus, the panel affirmed the district court's order granting judgment as a matter of law for the employer. *See id.* at 226.[5]

Although the plaintiff admitted certain policy violations, she denied the others, and the panel, finding sufficient evidence of pretext as to those alleged violations, affirmed a jury verdict for the plaintiff. *See id.* at 579-86.

[5] In *Cash Distrib. Co. v. Neely*, 947 So.2d 286, 294 (Miss. 2007), the Mississippi Supreme Court specifically rejected *Wallace* and the general rule that the plaintiff prove pretext as to each reason articulated by the employer. Interestingly for purposes of Crawford's position in this matter, the Mississippi Supreme Court opined that the Fifth Circuit's "minority position"

(Continued on following page)

In summary, Crawford has mischaracterized the state of the law in the Fifth and Eleventh Circuits. As a general rule, a plaintiff bringing suit in those circuits under the federal anti-discrimination laws must show pretext as to each of the employer's articulated legitimate, nondiscriminatory reasons for its decision. *See Chapman*, 229 F.3d at 1037; *Wallace*, 271 F.3d at 221-22. However, as discussed above, this general rule is not the "absolute" standard that Crawford asserts. Moreover, as discussed below in Parts II and III, the Fifth and Eleventh Circuit's case law is not in conflict with this Court's applicable jurisprudence or the case law of the other federal circuits.

---

had been adopted by the Third and Seventh Circuits, as well as by the Eleventh Circuit. *See id.* at 294 n.9.

The Mississippi Supreme Court believed the case before it to be distinguishable from *Wallace* because the plaintiff "Neely was free to admit that some or all of the wrongful acts attributed to him by Cash were true but were not the real reason for his dismissal." *See* 947 So.2d at 296. *Wallace*, however, did not hold to the contrary, and in order to conclude that it did, one would have to ignore altogether parts "C" and "D" of that Fifth Circuit opinion, *see* 271 F.3d at 222-26, as well as its subsequent holding in *Laxton*, 333 F.3d 572. Thus, the Mississippi Supreme Court, like Crawford, has simply misread *Wallace* and the Fifth Circuit's case law. Moreover, as discussed below in Part II, the Mississippi Supreme Court's characterization of the general rule as stated in *Wallace* as the "minority position" among the federal courts of appeals is incorrect.

II. CRAWFORD MISCHARACTERIZES THE THIRD, SIXTH, SEVENTH AND TENTH CIRCUITS' CASE LAW.

Contrary to Crawford's assertion, the Third, Sixth, Seventh and Tenth Circuits agree with the Fifth and Eleventh Circuits that, as a general rule, a plaintiff proceeding under the circumstantial evidence framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), must show pretext as to each of an employer's reasons, at least to the extent those reasons are articulated as independent reasons for the employment action at issue. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3rd Cir. 1994); *Smith v. Chrysler Corp.*, 155 F.3d 799, 809 (6th Cir. 1998); *Russell v. Acme-Evans Co.*, 51 F.3d 64, 69-71 (7th Cir. 1995); *Tyler v. RE/MAX Mt. States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000). *Accord Sher v. United States VA*, 488 F.3d 489, 507 (1st Cir. 2007). The courts in *Fuentes*, *Russell*, and *Smith* suggested that the general rule might not apply under certain circumstances, but found those circumstances to be absent from the cases before them. *See Fuentes*, 32 F.3d at 766; *Russell*, 51 F.3d at 70; *Smith*, 155 F.3d at 809. As such, any exceptions to the general rule discussed in those cases were mere *obiter dictum*, at least at that time. Only in *Tyler* did the court express its agreement with the general rule but nevertheless find that judgment for the employer was inappropriate. *See* 232 F.3d at 814-16.

The Seventh Circuit in *Russell* explained, at some length, the reason for the general rule as follows:

> Now it might seem that as soon as one reason for an allegedly discriminatory action is found to be a pretext (or rather must be *assumed* for purposes of summary judgment to be a pretext, because the plaintiff has succeeded in putting the matter in doubt), the company's honesty is so far drawn in question, and the plausibility of supposing that the action was not based on an invidious motive is so weakened, that the defendant cannot possibly stave off trial. But this is true only if the company has offered no other reason that, *if that reason stood alone* (more precisely if it did not have support from the tainted reason), would have caused the company to take the action of which the plaintiff is complaining.

51 F.3d at 69. (Emphasis in original.) The court then noted, in *dictum*, that "[t]here may be cases in which the multiple grounds offered by the defendant for the adverse action of which the plaintiff complains are so intertwined, or the pretextual character of one of them so fishy and suspicious, that the plaintiff could withstand summary judgment." *See id.* at 70. Nevertheless, the court did not suggest that the plaintiff ultimately bears the burden of demonstrating, either directly or indirectly, anything less than "real" discrimination:

> there is nothing within our power to do that would lighten the burden of the employee without depriving the employer of procedural rights conferred upon him by settled law. And these procedural rights are not to be thought merely irksome obstacles to truth and justice. They are necessary to distinguish the real from the spurious cases of discrimination.

See id. at 71.

Moreover, the Third Circuit has correctly recognized that there is a substantive basis for the general rule as well: "While this standard places a difficult burden on the plaintiff, it arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decisionmaking by the private sector in economic affairs." *See Fuentes*, 32 F.3d at 765. (Internal quotation marks and citation omitted.) Therefore, *Title VII of the Civil Rights Act of 1964*, 42 U.S.C. § 2000e *et seq.* ("Title VII"), "eliminates certain bases for distinguishing among employees," but "does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions." *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 109 S. Ct. 1775, 1784-85, 104 L. Ed. 2d 268, 280-81 (1989). (Emphasis in original.) *See also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612, 113 S. Ct. 1701, 1707, 123 L. Ed. 2d 338, 348 (1993) (*The Age Discrimination in Employment Act*, 29 U.S.C. § 621 *et seq.* ("ADEA") requires the employer to ignore an

employee's age" but "does not specify *further* characteristics that an employer must also ignore"). (Emphasis in original.) As such, neither Title VII nor the other federal anti-discrimination laws require an employer to have "cause" for its decisions. *See Price Waterhouse*, 490 U.S. at 239, 109 S. Ct. at 1784, 104 L. Ed. 2d at 281. *See also Nix*, 738 F.2d at 1187 (holding that Title VII does not "require the employer to have good cause for its decisions"). Rather, an "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *See id. See also Chapman*, 229 F.3d at 1030 (collecting cases holding the same); *Hazen Paper Co.*, 507 U.S. at 612, 113 S. Ct. at 1707, 123 L. Ed. 2d at 348 ("Although some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper *in any respect*, *see* [*McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824, 36 L. Ed. 2d at 677-78] this reading is obviously incorrect") (emphasis in original).[6] Accordingly, unless specifically proscribed by the statute(s) at issue, an

---

[6] *Accord Bishop v. Wood*, 426 U.S. 341, 349-50, 96 S. Ct. 2074, 2080, 48 L. Ed. 2d 684, 693 (1976) (declining to find a constitutionally-protected property interest in a public employee's at-will employment, and holding that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs.") (Footnote omitted.)

employer is entitled to act on *any* reason(s) in making its various employment decisions. *See Hazen Paper Co.*, 507 U.S. at 612, 113 S. Ct. at 1707-1708, 123 L. Ed. 2d at 348 (holding that the discharge of an employee to prevent his pension benefits from vesting may be actionable under the *Employee Retirement Income Security Act*, 29 U.S.C. § 1140, "[b]ut it would not, without more, violate the ADEA").

Respect for and adherence to the above principles is especially important in states such as Georgia, where the employment-at-will doctrine is not a matter of mere judicial deference under the common law, but rather, a statutorily-protected right. *See* O.C.G.A. § 34-7-1 ("An indefinite hiring may be terminated at will by either party.").[7] The Georgia courts, of course,

---

[7] *See also Reilly v. Alcan Aluminum Corp.*, 272 Ga. 279, 280, 528 S.E.2d 238, 239-40 (2000) (declining to find a state law claim for age discrimination, the court held that, "[a]lthough there can be public policy exceptions to the doctrine judicially created exceptions are not favored, and Georgia courts thus generally defer to the legislature to create them"); *Borden v. Johnson*, 196 Ga. App. 288, 289, 395 S.E.2d 628, 629 (1990) (declining to find a state law claim for pregnancy discrimination, the court held that whether "the courts of other jurisdictions may have done so is of no consequence because in Georgia . . . this rule is statutory") (internal quotation marks omitted); *Green v. Sun Trust Banks, Inc.*, 197 Ga. App. 804, 806, 399 S.E.2d 712, 715 (1990) (declining to find public-policy claim for racially-motivated discharge under state law). *Accord Reilly v. Alcan Aluminum Corp.*, 221 F.3d 1170, 1171 (11th Cir. 2000) ("An employee-at-will in Georgia may be terminated without judicial recourse for wrongful termination.").

(Continued on following page)

recognize that "[t]here are rights created under federal statutes which may be enforced by certain aggrieved at-will employees without regard to the principles of state law." *See Borden*, 196 Ga. App. at 290, 395 S.E.2d at 629. Nevertheless, the general rule requiring a plaintiff to show pretext as to each of an employer's articulated reasons serves to properly focus the court's inquiry on the specific form(s) of prohibited discrimination at issue, thereby protecting the respective statutory rights of the parties to the employment relationship under both federal and state law. Adopting broad exceptions to the general rule based upon the mere number of articulated reasons is unnecessary, unwarranted and unwise.

III. THERE IS NO SPLIT IN THE CIRCUITS AS TO THOSE CIRCUMSTANCES UNDER WHICH THE GENERAL RULE MAY NOT APPLY.

Therefore, contrary to Crawford's assertion, each of the federal circuits discussed in his Petition require, as

---

In contrast to Georgia, employment at will in most states is a common law doctrine. *See, e.g., Hinrichs v. Tranquilaire Hospital*, 352 So.2d 1130 (Ala. 1977); *Smith v. Piezo Technology & Professional Adm'rs*, 427 So.2d 182 (Fla. 1983). Some state courts have created specific exceptions to their respective doctrines, *see e.g. Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981), but Montana is alone among the states in requiring that an employer have "good cause" for the termination of a non-probationary employee generally, *see* Mont. Code Ann. § 39-2-901.

a general rule, that a plaintiff show each of the defendant-employer's articulated reasons to be pretextual. The City submits that many of the so-called "exceptions" urged here by Crawford simply do not rise to the level of a judicially-manageable legal standard. *See, e.g., Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1126-27 n.6 (10th Cir. 2005) (employing the term "circumstance" in lieu of "exception"). For example, redundancy aside, does "so fishy and suspicious," *see Jaramillo v. Colorado Judicial Dep't*, 427 F.3d 1303, 1311 (10th Cir. 2005) (*quoting Chapman*, 229 F.3d at 1050 (Birch, J., dissenting)), constitute a discernible legal standard.[8] Likewise, how does a plaintiff show a person to be "a liar in an outrageous manner" (or even an outrageous liar)? *See Chapman*, 229 F.3d at 1050 (Birch, J., dissenting). How many reasons, in fact, constitute a "plethora"? *See Tyler*, 232 F.3d at 814. And how does a plaintiff who has been unable to prove pretext as to each of an employer's reasons nevertheless demonstrate that the employer "lacks *all* credibility"? *See Jaramillo*, 427 F.3d at 1311 (*quoting Chapman*, 229 F.3d at 1050 (Birch, J., dissenting)). (Emphasis supplied.) Simply put, mere wordplay fails to provide the parameters necessary for guiding the courts in the uniform and predictable application of the law so as to be elevated to the status of a legal standard.

---

[8] Of course, this wording, as originally contained in *Russell*, was, at most, mere *dictum* in that case and, possibly, something less than that. *See* 51 F.3d at 70.

At most, only three (or four) of the seven exceptions urged upon this Court by Crawford's Petition even begin to rise to such a level: (1) where multiple legitimate, nondiscriminatory reasons articulated by the defendant are "intertwined," *see Tyler*, 232 F.3d at 814, or where one of those reasons "predominates" over the others, *see Bryant*, 432 F.3d at 1127; (2) where "[t]he employer has changed its explanation under circumstances that suggest dishonesty or bad faith," *see Jaramillo*, 427 F.3d at 1311; and (3) where "the plaintiff discredits each of the employer's objective explanations, leaving only subjective reasons to justify its decision," *see id.* Contrary to Crawford's assertion, the federal circuits are not split, at least not in any substantive manner, on any of these so-called exceptions.

Although no circuit court has offered any specific guidance on when an employer's articulated reasons may be said to be intertwined – or when one of them may be said to predominate – this exception(s) appears to refer to the general requirement that a plaintiff debunk each reason that, *standing alone*, caused the employer to take the action at issue. *See, e.g., Russell*, 51 F.3d at 69 ("this is true only if the company has offered no other reason that, *if that reason stood alone* (more precisely if it did not have support from the tainted reason), would have caused the company to take the action of which the plaintiff is complaining") (emphasis in original); *Jaramillo*, 427 F.3d at 1310 (quoting *Russell*); *Smith*, 155 F.3d at 809 ("The two justifications and the sources from

which they were derived were separate in nature"); *but see Wolff v. Buss Am. Inc.*, 77 F.3d 914, 925 (7th Cir. 1996) (affirming summary judgment while recognizing that the employer did not contend that the two remaining reasons would be sufficient, standing alone, to justify the plaintiff's dismissal). The Fifth Circuit's case law does not differ from those other circuits in this regard. *Compare Wallace*, 271 F.3d 221-22 (observing that the employer had offered "two *independent* reasons" for the decision at issue and, ultimately, affirming summary judgment for the employer) (emphasis in original), *and Laxton*, 333 F.3d at 579 (noting that the employer had relied upon the "cumulative effect" of its five reasons to justify the plaintiff's discharge and, ultimately, affirming verdict for the employee). Moreover, there is no evidence that the Eleventh Circuit is not similarly willing to undertake such an analysis when required by the facts of a particular case. *See, e.g., Bojd v. Golder Assocs.*, 212 Fed. Appx. 860, 863 (11th Cir. 2006) ("The incidents were cited as specific examples of continuing problems and not independent reasons for Bojd's termination").[9]

[9] While *Bojd* is not binding precedent in the Eleventh Circuit, *see* 11th Cir. R. 36-2, and, perhaps not directly on point here, there is no published circuit authority rejecting such an analysis as improper in that circuit. Moreover, the absence of any binding authority as to this particular exception is not particularly noteworthy inasmuch as Judge Birch's dissent in *Chapman* conceded that the percentage of cases possibly

(Continued on following page)

As to the second reason – a change in an employer's articulated reasons – both the Fifth and the Eleventh Circuits have held that such a change may be evidence of pretext. *See Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1298 (11th Cir. 2006) ("an employer's failure to articulate clearly and consistently the reason for an employee's discharge may serve as evidence of pretext"); *Strong v. University Healthcare Sys., L.L.C.*, 482 F.3d 802, 806 n.2 (5th Cir. 2007) (acknowledging the plaintiff's argument that the employer had "'constantly changed' its reasons for firing her," but holding that the record revealed "no material change"). Like the Fifth Circuit in *Strong*, the Tenth Circuit in *Jaramillo* has recognized that "the mere fact that the [employer] has offered different explanations for its decision does not create a genuine question of pretext." *See* 427 F.3d at 1311 (discussing circumstances under which such a change supports a finding of pretext and holding that the defendant's inconsistent explanations for the decision in that case were insufficient to do so). *See also Zaccagnini v. Chas. Levy Circulating Co.*, 338 F.3d 672, 676-77 (7th Cir. 2003) (finding pretext as to the employer's second articulated reason when, *inter alia*, it was raised for the first time in the employer's summary judgment reply brief). Thus, once again, Crawford's assertion that there is a split between the circuits is incorrect.

---

affected by the proposed exceptions would have been "quite small." *See* 229 F.3d at 1050 n.32.

Finally, there is no split between the circuits with regard to the last proposed exception; namely, where "the plaintiff discredits each of the employer's objective explanations, leaving only subjective reasons to justify its decision." *See Jaramillo*, 427 F.3d at 1310. *See also Chapman*, 229 F.3d at 1050-51 (Birch, J., dissenting). Although that exception is listed with four others in *Jaramillo*, the court there did not find that exception – or any of the others – applicable to the case before it. *See* 427 F.3d at 1310-12. Nor have any of the other cases cited in the Petition applied that particular exception.

As authority for this exception, *Jaramillo* cited *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1298-99 (D.C. Cir. 1998) (*en banc*). In *Aka*, the court held that a reasonable jury could have concluded that the plaintiff was "significantly better qualified" than the successful candidate. *See id.* at 1297. Furthermore, the court expressed reluctance "to give too much weight at summary judgment" to the decisionmaker's subjective opinion regarding the plaintiff's lack of enthusiasm during his interview, and held that a jury could find that reason to be pretextual based on the decisionmaker's failure to indicate the same on her interview summary sheet. *See id.* at 1298. In so holding, the court opined that, "[p]articularly in cases where a jury could reasonably find that the plaintiff was otherwise significantly better qualified than the successful applicant, an employer's asserted strong reliance on subjective feelings about the candidates may mask discrimination." *See id.* Finally, the court held that there existed other evidence of

discrimination, including a dispute as to whether the plaintiff, in fact, had told the decisionmaker during his interview that he "did not really want" the position, a statement which the decisionmaker had likewise failed to indicate on the interview summary sheet and which was articulated for the first time in a "later affidavit." *See id.* at 1299. Accordingly, the court held that summary judgment for the employer was improper. *See id.* at 1299-1300.

Therefore, its reference in *Jaramillo* notwithstanding, *Aka* is not a case in which the plaintiff was unable to establish pretext with regard to the so-called subjective reason. Instead, and in addition to other evidence of discrimination, the plaintiff in *Aka* specifically disputed the employer's characterization of his interview demeanor and further supported his argument by pointing to the absence of that reason in any of the employer's contemporaneous documentation. *See* 156 F.3d at 1299-1300. *Compare Chapman*, 229 F.3d at 1036 ("Chapman never refuted these objective bases"); *see also id.* at 1051 n.34 (Birch, J., dissenting) ("It is true that Aka, unlike Chapman, specifically disputed the subjective assessment of his interview"). Moreover, as demonstrated in Part II, a properly-articulated subjective reason is not to be accorded any lesser status than an objective reason under this Court's jurisprudence. Thus, there is no split between the circuits even as to this last proposed exception to the general rule requiring that a plaintiff establish pretext as to each of an employer's legitimate, nondiscriminatory reasons, whether objective or subjective.

IV. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT CRAWFORD'S CLAIM WAS SUBJECT TO DISMISSAL PURSUANT TO THE GENERAL RULE.

Finally, Crawford's unfounded assertion of a split between the circuits notwithstanding, he cannot bring his discharge within any of the so-called exceptions to the general rule. Before the Eleventh Circuit, Crawford neither acknowledged the general rule in *Combs* nor argued that his case fell within any exception(s) not foreclosed by *Chapman*. Indeed, even in his Petition here, Crawford does not state which of the City's reasons are undisputed – and which, if any, are not – and does not address which exception to the general rule is purportedly applicable to the facts of his case. To hold forth on the propriety of any exception(s) not presented by the facts of this case, as Crawford effectively urges the Court to do, would amount to nothing more than a mere advisory opinion, a practice long disfavored by the Court. *See Massachusetts v. EPA*, ___ U.S. ___, 167 L. Ed. 2d 248, 267, 127 S. Ct. 1438, 1452 (2007).

The City articulated four legitimate, nondiscriminatory reasons for its decision to discharge Crawford: the Department's continued patrolling of Interstate 85; new complaints regarding overtime pay; problems in the Department's dispatch office; and general complaints of low morale and favoritism within the Department. (*See* Pet. App. 12a.) Mayor Hannah testified that the City Council would have voted to discharge Crawford based on the Interstate 85 issue alone (R2-27-#83, p. 6, ¶ 15), and Crawford

proffered no evidence, by way of cross-examination or otherwise, tending to show that the Mayor and Council members were not genuinely upset about these issues or that they did not honestly believe Crawford to be responsible, at least in part, for each of them (*see* Pet. App. 13a n.2, 17a).[10]

As both the district court and the court of appeals found, Crawford failed to show any of the City's articulated reasons to be without credence. (*See* Pet. App. 7a, 16a-17a.) The magistrate judge had concluded in his report and recommendation that although Crawford had failed to show that the City could not have held an honest belief as to the overtime issue, its failure to criticize him with regard to that issue prior to his discharge, "*suggested* that the [City's] wage issue *might* be evidence of pretext." (*See* Pet. App. 66a-69a.) (Emphasis supplied.) The district court's Order, however, concluded simply that there was no evidence that the Mayor or Council did not

[10] The Mayor and Council voted to place Crawford's supervisor, Brown, on probation at the same meeting during which they voted to discharge Crawford, and continued Brown in the City's employ for less than four more months until June 16, 2004. (*See* Pet. App. 24a, 38a.) Brown testified that he believed the Mayor, the City Council and the City Administrator were genuinely upset with Crawford based on their perception that Crawford was responsible for the Department's continued activity on Interstate 85 and its problems relating to morale and favoritism. (*See* Pet. App. 13a n.2.) While Brown believed the source of these charges to be "certain unnamed subordinate employees" who were unhappy because Crawford sought to hold them accountable for their job performance (*see id.*), this belief is not probative of any reason proscribed by Title VII.

reasonably rely upon their genuinely-held beliefs in connection with this issue, their failure to apprise Crawford of any displeasure prior to that time notwithstanding. (*See* Pet. App. 17a, 19a.) Although Crawford also argued before the district court that he was not personally responsible for these problems and that it was unfair to hold him responsible for the acts of his subordinates, such is the nature of a supervisor's duties and responsibilities. (*See* Pet. App. 16a-17a n.4.)

On appeal, of course, Crawford simply made no attempt to rebut any of the four articulated reasons. (*See* Pet. App. 7a.) Instead, Crawford argued – and only in reply – that the City had failed to properly articulate its legitimate, nondiscriminatory reasons. (*See* Reply Brief of Plaintiff-Appellant, 09/19/06, pp. 7-8.) Crawford also argued that Williams' alleged comments and their purported temporal relationship to Crawford's discharge, as well as Brown's testimony regarding the internal affairs investigation as yet another reason allegedly given for that action, was sufficient evidence of pretext to withstand summary judgment. (*See* Brief of Appellant, 07/20/06, pp. 10-19.) However, the court of appeals, like the district court before it, found that these statements, while presumed true for purposes of summary judgment, and even when viewed as suggesting any retaliatory animus, failed to create a genuine issue of material fact as to whether any or all of the City's articulated reasons were a pretext for retaliation. (*See* Pet. App. 8a.)

While a plaintiff who fails to (or otherwise cannot) contest an employer's legitimate, nondiscriminatory reasons may not be entirely foreclosed from pursuing a claim under Title VII, the combined effect of the employment-at-will doctrine and the limited scope of the federal statute logically presents him with a formidable challenge in showing that the employer nevertheless acted for discriminatory – or, in this case, retaliatory – reasons. *See Russell*, 51 F.3d at 71; *Fuentes*, 32 F.3d at 765. The district court here concluded, and the court of appeals subsequently agreed, that Williams' alleged comments, taken as true but considered in the context of the summary judgment record as a whole, including the uncontested reasons articulated by the City, failed to raise a genuine issue as to whether it terminated Crawford's employment in retaliation for his investigation of Tallman's internal complaint(s). In this regard, Crawford's evidence is far less compelling than the plaintiff's showing in several of the cases relied upon by the Petition as proof of the purported split between the circuit. *See, e.g., Jaramillo*, 427 F.3d at 1310-15 (holding that evidence that the employer had given a false reason for not hiring the plaintiff (*i.e.*, that the plaintiff had scored lower than the successful applicant on the promotional exam), used subjective hiring criteria, and offered differing explanations as to the reasons for the decision was nevertheless insufficient to establish pretext); *Wolf*, 77 F.3d at 923 (affirming summary judgment although the plaintiff showed pretext as to four of the six reasons offered by the employer, and the employer had not contended that the two remaining reasons standing alone would have

justified the plaintiff's dismissal). In summary, Crawford's assertion of the purported split between the federal circuits as to the general rule is a mere pretext to have this Court review the grant of summary judgment against him under the general liability principles previously settled by this Court in *St. Mary Honor Ctr.* and *Reeves*. As such, the City respectfully submits that Crawford's Petition does not present a compelling reason for granting a writ of *certiorari* and, thus, should be denied.

CONCLUSION

Since the Eleventh Circuit's opinion is in accordance with this Court's precedent and does not conflict with the decisions reached by the other federal courts of appeals, as well as for the other reasons set forth above, Crawford's Petition should be denied.

Respectfully submitted,

R. READ GIGNILLIAT
Counsel of Record
WILLIAM D. DEVENEY
JENNIFER H. KEATON
ELARBEE, THOMPSON, SAPP & WILSON, LLP
800 International Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 659-6700

Attorneys for Respondent

69

(3)

No. 07-233

FILED

OCT 3 - 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

SUPREME COURT OF THE UNITED STATES

DANIEL CRAWFORD,

Petitioner,

v.

CITY OF FAIRBURN, GEORGIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY TO BRIEF IN OPPOSITION

ERIC SCHNAPPER*
University of Washington School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

CHRISTOPHER G. MOORMAN
Law Offices of Christopher G. Moorman
945 East Paces Ferry Road, Suite 2610
Atlanta, GA 30326
(404) 760-2730

ROBERT N. KATZ
Katz, Stepp & Miller, LLC
945 East Paces Ferry Road, Suite 2610
Atlanta, GA 30326
(404) 240-0400

Counsel for Petitioner *Counsel of Record

TABLE OF CONTENTS

Page

Table of Authorities ii

This Case Presents an Important and Well-Established Conflict Among the Lower Courts 1

Conclusion 16

TABLE OF AUTHORITIES

Page

Arnold v. Tuskegee University,
212 Fed. Appx. 803, 810 (11th Cir. 2006) 5

Belgasem v. Water Pik Technologies, Inc.,
457 F. Supp. 2d 1205, 1214 (D.Colo. 2006)..... 13

Bojd v. Golder Associates, Inc.,
212 Fed. Appx. 860, 862 (11th Cir. 2006) 5, 6, 7, 8

Bryant v. Farmers Ins. Exch.,
432 F. 3d 114 (10th Cir. 2005) 11

Cash Distributing Co., Inc. v. Neely,
947 So. 2d 286 (Miss. 2007) 13, 14

Champ v. Calhoun County Emergency
Management Agency, 2007 WL 879846 *7
(11th Cir. March 26, 2007)..... 6

Chapman v. AI Transport,
229 F. 3d 1012, (11th Cir. 2000)..... 2, 3, 4

Combs v. Plantation Patterns,
106 F. 3d 1519 (11th Cir. 1997)..... 2, 3, 5

Cooper v. Southern Co.,
390 F. 3d 695, 725-26 (11th Cir. 2004)..... 3, 5

Dusenberry v. Peter Kiewit Sons, Inc.,
2007 WL 1346598 *5 (D. Colo. May 8, 2007)..... 13

EEOC v. Public Service Co. of Colo.,
2006 WL 1215393 *4 (D. Colo. May 4, 2006)..... 13

Hurlbert v. St. Mary's Health Care Sys., Inc.,
439 F. 3d 1286, 1298 (11th Cir. 2006)..... 8

Jaramillo v. Colorado Judicial Dep't,
427 F. 3d 1303, 1311 (10th Cir. 2005)..... 10, 11, 12, 13

Laxton v. GAP, Inc.,
333 F. 3d 572, 580 (5th Cir. 2003)..... 9, 10

Roebuck v. Drexel University,
852 F. 2d 715 (3d Cir. 1988)..... 13, 14

Serrano v. Veneman,
410 F. Supp. 2d 1049, 1060 (D.N.M. 2005)..... 13

Trujillo v. Board of Educ. of Albuquerque
Public Schools, 2006 WL 4079032 *2
(D.N.M. July 9, 2006)..... 13

Tyler v. RE/MAX Mt. States., Inc.
232 F. 3d 808 (10th Cir. 2000)..... 11, 12

Wallace v. The Methodist Hospital System,
271 f. 3d 212, 222 (5th Cir. 2001)..... 9, 10, 14

THIS CASE PRESENTS AN IMPORTANT AND WELL-ESTABLISHED CONFLICT AMONG THE LOWER COURTS

Respondent's descriptions of the state of the law in the lower courts, and of the standard in the Eleventh Circuit from which this case arises, are simply inaccurate. Respondent insists that all the lower courts to address the issue have agreed upon a single formula for deciding cases in which an employer offers multiple reasons for an allegedly discriminatory act. First, according to respondent, if the multiple reasons are "intertwined," all lower courts agree that rebuttal of one reason will suffice to rebut the rest. (Br. Op. 24-25). Second, respondent insists, if the employer has changed its articulated reasons, all lower courts agree that rebuttal of one reason will suffice to rebut the rest. (Br. Op. 24, 26). Third, respondent contends, if neither of these circumstances is present, all lower courts agree that each proffered reason must be separately rebutted. (Br. Op. 23-27). In fact, however, the particular formulation now proposed by respondent is different from the standard

in any of the seven circuits to have addressed this issue, as well as from the standard applied in federal cases by the Mississippi Supreme Court.

The characterization which respondent offers in this Court of the standard in the Eleventh Circuit differs sharply from the manner in which respondent described Eleventh Circuit precedent in the proceedings below. Respondent insisted in both the District Court and the Court of Appeals that Eleventh Circuit precedent flatly required separate rebuttal of every proffered reason.[1] Respondent's earlier

---

[1]The magistrate judge found that Crawford had rebutted two reasons articulated by the city, but concluded that Eleventh Circuit caselaw required that summary judgment be awarded to the defendant because the plaintiff had failed to rebut "all" the proffered reasons. (Pet. App. 74a). The magistrate judge believed that result was mandated by the Eleventh Circuit decisions in *Chapman v. AI Transport*, 229 F. 3d 1012, (11th Cir. 2000) and *Combs v. Plantation Patterns*, 106 F. 3d 1519 (11th Cir. 1997) (Pet. App. 74a).

Respondent urged the District Judge to uphold the award of summary judgment because "[t]he Magistrate Judge correctly concluded that Plaintiff failed to show pretext as to *each of* these reasons. See Combs, 106 F. 3d at 1429; Chapman, 229 F. 3d at 1024-25." (Defendant's Response to Plaintiff's Objections to Magistrate Judge's Report and Recommendation, 23-24)(emphasis added).

> [T]he City is entitled to Judgment as a matter of law on Plaintiff's Title VII/Participation Clause

> claim on the grounds that Plaintiff failed to demonstrate pretext as to *the majority* of the legitimate, non-retaliatory reasons articulated by the City for the termination decision. . . . See Chapman v AI Transport, 229 F. 3d 1012 (11th Cir. 2000)(*en banc*)("[T]o avoid summary judgment, a plaintiff must produce sufficient evidence for a reasonable factfinder to conclude that *each* of the employer's proffered discriminatory reasons is pretextual"); Combs v. Plantation Patterns, 106 F. 3d 1519, 1539-43 (11th Cir. 1997)(requiring employee to rebut "*all of* the defendant's proffered nondiscriminatory reasons for its actions to avoid judgment as a matter of law.)

(Defendant's Objections to Report and Recommendation of Magistrate Judge, 18-19)(emphasis added).

> The city notes that to demonstrate pretext, a plaintiff's burden is "to demonstrate the existence of a genuine issue of fact as to the truth of each of the [defendant]'s proffered reasons for its challenged action. Combs v. Plantation Patterns, 106 F. 3d 1519, 1529 (11th Cir. 1997)(emphasis supplied).

(*Id.* at 19 n. 11.)

On appeal the city again noted that it had offered multiple reasons for firing the plaintiff, and insisted that the plaintiff was required to show pretext as to each of these reasons. *See Combs v. Plantation Patterns*, 106 F. 3d 1519, 1529 (11th Cir. 1997)(The Plaintiff's burden is "to demonstrate the existence of a genuine issue of fact as to the truth of *each of* the [defendant]'s proffered reasons for its challenged action.") *Chapman v. AI Transp.*, 229 F. 3d 1012, 1024-25 (11th Cir. 2000)("If the Plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether *each of* the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim.") *See also Cooper v. Southern Co.*, 390 F. 3d 695, 725-26 (11th Cir. 2004).

> Brief of Defendant-Appellee City of Fairburn, p. 45)(emphasis added).

description of Eleventh Circuit law was the correct one. In seven different decisions the court of appeals has announced a per se separate-rebuttal standard that contains neither of the exceptions that respondent insists are somehow part of Eleventh Circuit jurisprudence.

> If the employer proffers more than one legitimate nondiscriminatory reason, the plaintiff must rebut *each of the reasons* to survive a motion for summary judgment.[2]
>
> In order to avoid summary judgment, a plaintiff must produce sufficient evidence for a reasonable factfinder to conclude that *each of* the employer's proffered reasons was pretextual.[3]
>
> [E]ven if [the plaintiff could discredit one of the reasons . . . offered for not hiring him, it would still not establish pretext, because to do so, Cooper would have to establish that *each of* [the employer's

---

[2]Pet. App. 7a (emphasis added).

[3]*Chapman v. AI Transport*, 229 F. 3d 1012, 1037 (11th Cir. 2000)(emphasis added). Respondent quoted this holding in its briefs in the courts below. See n. 1, *supra*.

proffered] reasons was pretextual.[4]

A plaintiff in a discrimination case based on circumstantial evidence can avoid judgment as a matter of law by putting on a prima facie case and by producing evidence sufficient to discredit in the mind of a reasonable juror *all of* the defendant's proffered nondiscriminatory reasons for its actions.[5]

Where multiple reasons are advanced, the plaintiff must show that *each reason* was a pretext.[6]

[T]o avoid summary judgment, the plaintiff must produce sufficient evidence for a reasonable fact-finder to conclude that *each of* the employer's proffered reasons is pretextual.[7]

[E]ven though [one proffered] reason was not totally accurate, summary judgment

---

[4]*Cooper v. Southern Co.*, 390 F. 3d 695, 730 (11th Cir. 2004)(emphasis added). Respondent cited this passage in *Cooper* in the courts below. See n. 1, *supra*.

[5]*Combs v. Plantation Patterns*, 106 F. 3d 1519, 1543 (11th Cir. 1997)(emphasis added). This passage was quoted by respondent in the courts below. See n. 1, *supra*.

[6]*Bojd v. Golder Associates, Inc.*, 212 Fed. Appx. 860, 862 (11th Cir. 2006)(emphasis added).

[7]*Arnold v. Tuskegee University*, 212 Fed. Appx. 803, 810 (11th Cir. 2006)(emphasis added).

> is still appropriate due to [the plaintiff's] failure to demonstrate that *the remainder* of the defendant's proffered reasons were pretextual.[8]

In this Court respondent suggests that the Eleventh Circuit has adopted the "intertwined" standard utilized in the First, Sixth, Seventh and Tenth Circuits (although not in the Third Circuit or the Mississippi Supreme Court). (Br. Op. 24; see Petition 12-19). Respondent bases that assertion solely on a single passage in *Bojd v. Golder Assocs.*, 212 Fed. Appx. 860, 863 (11th Cir. 2006): "The incidents were cited as specific examples of continuing problems and not independent reasons for Bojd's termination." This passage has nothing whatever to do with the issue of whether a plaintiff must separately rebut every proffered reason; the plaintiff in that case did not claim to have directly rebutted any proffered reasons. The passage in question actually occurs in the court's analysis of a factual

---

[8]*Champ v. Calhoun County Emergency Management Agency*, 2007 WL 879846 *7 (11th Cir. March 26, 2007)(emphasis added).

dispute about whether a supervisor was attempting to fabricate some new excuse for firing the plaintiff.[9]

Respondent contends that the Eleventh Circuit has also adopted the rule applied in the Tenth Circuit--although not in the First, Third, Sixth or Seventh Circuits--that rebuttal of one reason can call other proffered reasons into question if the plaintiff also

---

[9]In *Bojd* a supervisor whose earlier recommendation of dismissal had not been accepted, later again recommended that Bojd be fired, which he was. The plaintiff had urged that the second recommendation was just a new excuse concocted by a supervisor who in fact was trying to get rid of Bojd because of religion. In the passage in question the court of appeals is merely explaining that the reasons in the second recommendation were not new at all, but rather a report that old problems had continued.

The context in which the passage in question occurs reads in full as follows:

> [The supervisor's later] memo cited a number of examples of Bojd's "total disregard, open defiance and complete lack of respect of management authority and decision making responsibilities." The occurrence of some of these incidents after [the supervisor] initially renewed his recommendation [of dismissal] does not raise a reasonable inference that [the supervisor] was attempting to cover up a discriminatory reason. The incidents were cited as specific examples of continuing problems and not independent reasons for Bojd's termination.
>
> 212 Fed. Appx. at 862 (footnote omitted).

shows that the employer has altered its reasons. For this characterization of Eleventh Circuit law respondent relies solely on the following passage in *Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F. 3d 1286, 1298 (11th Cir. 2006): "an employer's failure to articulate clearly and consistently the reason for an employee's discharge may serve as evidence of pretext." But *Hurlbert*, like *Bojd*, was not a case in which a plaintiff, having rebutted some proffered reasons, sought to argue that that rebuttal also called into question the employer's remaining reasons. Rather, the plaintiff *Hurlbert* contended (successfully) that inconsistency in an employer's explanations was the type of evidence that would by itself call into question all of those reasons. 439 F. 3d at 1298-99.

The Fifth Circuit in five different cases has announced the same per se rule followed in the Eleventh Circuit. (Pet. 10-12). Respondent contends that the Fifth Circuit recognizes (like the First, Sixth, Seventh and Tenth) recognizes an exception for cases

in which an employer's proffered reasons are intertwined. (Br. Op. 24). Respondent relies on the phrase "cumulative effect" in *Laxton v. GAP, Inc.*, 333 F. 3d 572, 580 (5th Cir. 2003). But that phrase is merely part of the court's description of the position of the defendant employer, which asserted as a single reason for firing the plaintiff the company's unhappiness with a protracted period of rules violations..[10] Respondent notes that the phrase "independent reasons" appears in *Wallace v. The Methodist Hospital System*, 271 f. 3d 212, 222 (5th Cir. 2001). But there too the phrase is merely a description of the employer's assertion that (unlike

---

[10]The phrase occurs, under the heading "proffered legitimate reason" (singular):

> Gap proffers that Laxton repeatedly violated store policy and alienated those who worked for her, the cumulative effect of which justified her termination. . . . The conduct occurred over a six-week period from July 8, 1999 to August 17, 1999. First . . . . Second . . . Third . . . . Fourth . . . . Gap asserts that Laxton's multiple violations were "too much, too soon."
> 333 F. 3d 572.

Laxton) it was proffering two reasons, not one.[11]

Four circuits--the First, Sixth, Seventh and Tenth--hold that rebuttal of one proffered reason calls into question the rest of the employer's proffered reasons if any of those explanations are "fishy" or "suspicious." (Pet. 14-19). Respondent does not contend that the Eleventh (or Fifth or Third) circuits apply this standard, but simply dismisses the standard as unworkable.

> The City submits that many of the so-called "exceptions" urged here by Crawford simply do not rise to the level of a judicially-manageable legal standard. . . . For example, redundancy aside, does "so fishy and suspicious," *see Jaramillo v. Colorado Judicial Dep't*, 427

---

[11]271 F. 3d at 222 n. 14:

> We note that Methodist did not assert that these two acts together constituted a single nondiscriminatory reason for Wallace's termination. As a result, we have focused solely on what Wallace must show in order to rebut each of the independent reasons Methodist asserts.

In this passage "independent" merely indicates that the court accepts as controlling the employer's characterization of its actions as involving two reasons, rather than a single reason resting on two events.

> F. 3d 1303, 1311 (10th Cir. 2005) . . . constitute a discernable legal standard [?] . . . Simply put, mere wordplay fails to provide the parameters necessary for guiding the courts in the uniform and predictable application of the law so as to be elevated to the status of a legal standard.

(Br. Op. 22). Respondent appears to be suggesting that the Eleventh Circuit rule does not conflict with the "fishy and suspicious" standard in four other circuits because the "fishy and suspicious" formulation is so vague that it is not really a legal standard at all. But assuredly the Eleventh Circuit decision in the instant case is "in conflict with" the decisions in the First, Sixth, Seventh and Tenth Circuits adopting the "fishy and suspicious" standard, Sup. Ct. R. 10(a), regardless of the merits of that plurality rule.

Relying on similar reasoning, respondent specifically disagrees with the Tenth Circuit decisions in *Bryant v. Farmers Ins. Exch.*, 432 F. 3d 114 (10th Cir. 2005), *Jaramillo v. Colorado Judicial Dep't*, 427 F. 3d 1303 (10th Cir. 2005), and *Tyler v. RE/MAX Mt. States., Inc.* 232 F. 3d 808 (10th Cir. 2000), objecting

that the four additional standards which those decisions (but not the Eleventh Circuit) adopted are also unsound. (Br. Op. 22). But the standards adopted in these Tenth Circuit decisions, right or wrong, are assuredly different from the Eleventh Circuit decision in the instant case.

The Tenth Circuit, unlike the Eleventh (or any other) Circuit, holds that a plaintiff need not rebut all of an employer's reasons if "the plaintiff discredits each of the employer's objective explanations, leaving only subjective reasons to justify its decision." *Jaramillo*, 427 F. 3d at 1310. Respondent contends that this difference between the Tenth and Eleventh Circuit standards does not matter because in *Jaramillo* itself the Tenth Circuit, although applying this objective-subjective standard, concluded that it was not satisfied in that case. (Br. Op. at 26). But the existence of an inter-circuit conflict under Rule 10 is determined by whether several circuits have announced different legal standards, not by which

party prevailed when those conflicting standards were applied. The objective-subjective standard in *Jaramillo* is controlling law in the Tenth Circuit and of necessity applied by district courts in that circuit.[12]

Unlike the Eleventh and Fifth Circuits (which always require separate rebuttal of each proffered reason) and unlike the First, Sixth, Seventh, and Tenth Circuits (which in some but not all cases permit rebuttal of one or more proffered reason to call into question the rest), the Mississippi Supreme Court in *Cash Distributing Co., Inc. v. Neely*, 947 So. 2d 286 (Miss. 2007) and the Third Circuit in *Roebuck v. Drexel University*, 852 F. 2d 715 (3d Cir. 1988), have simply dispensed altogether with any separate

---

[12]*Dusenberry v. Peter Kiewit Sons, Inc.*, 2007 WL 1346598 *5 (D. Colo. May 8, 2007)(quoting *Jaramillo*); *Belgasem v. Water Pik Technologies, Inc.*, 457 F. Supp. 2d 1205, 1214 (D.Colo. 2006)(quoting *Jaramillo*); *Trujillo v. Board of Educ. of Albuquerque Public Schools*, 2006 WL 4079032 *2 (D.N.M. July 9, 2006)(quoting *Jaramillo*); *EEOC v. Public Service Co. of Colo.*, 2006 WL 1215393 *4 (D. Colo. May 4, 2006)(denying summary judgment because of the *Jaramillo* objective-subjective standard); *Serrano v. Veneman*, 410 F. Supp. 2d 1049, 1060 (D.N.M. 2005)(quoting *Jaramillo*).

rebuttal requirement. (Pet. 13, 17-18). Respondent frankly acknowledges that holding in *Cash Distributing*[13] by the highest court in Mississippi, and makes no effort to explain away the Third Circuit decision in *Roebuck*.

These conflicting standards are of controlling importance in the instant case. The fact that Crawford discredited at least one of the reasons proffered by the employer would without more be sufficient to withstand summary judgment under the Mississippi Supreme Court decision in *Cash Distributing* and the Third Circuit decision in *Roebuck*. The district court and court of appeals agreed that Crawford had adequately rebutted one critical reason given for his dismissal, the city's objections to the depth and scope of Crawford's investigation of sexual harassment in the city Police

---

[13]Br. Op. 14 n. 5 ("In *Cash Distrib. Co v. Neely* . . . the Mississippi Supreme Court specifically rejected [the Fifth Circuit decision in] *Wallace* and the general rule that the plaintiff prove pretext as to each reason articulated by the employer.")

Department. In the instant case, where the plaintiff alleges that he was fired in retaliation for opposing sexual harassment, an undisputed violation of section 704(a) of Title VII, dismissal for undue vigor in investigating sexual harassment assuredly meets the "fishy and suspicious" standards of the First, Sixth, Seventh and Tenth standards. Among the seven circuits and one state in which this important question of federal law has been resolved, Crawford would win in six (the First, Third, Sixth, Seventh and Tenth Circuits, as well as Mississippi) and would lose in two (the Fifth and Eleventh Circuits). Certiorari should be granted to resolve that well-established and multi-faceted conflict.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

ERIC SCHNAPPER*
University of Washington School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

CHRISTOPHER G. MOORMAN
Law Offices of Christopher G. Moorman
945 East Paces Ferry Road, Suite 2610
Atlanta, GA 30326
(404) 760-2730

ROBERT N. KATZ
Katz, Stepp & Miller, LLC
945 East Paces Ferry Road, Suite 2610
Atlanta, GA 30326
(404) 240-0400

Counsel for Petitioner *Counsel of Record